VOL. 39 (2d Series) MARCH 16, 1973 No. 6

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(39 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 39 (2d Series)

Pages 865 to 982

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

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Washington D.C. 20402 - on a subscription basis

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F.C.C. 73-192

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE & TELEGRAPH CO.	P-C-8276-1
ITT WORLD COMMUNICATIONS INC.	T-C-2452-1
RCA GLOBAL COMMUNICATIONS, INC.	T-C-2448-1
WESTERN UNION INTERNATIONAL, INC.	T-C-2444-1
Applications for Authority To Participate in the Construction and Operation of the TAT-6 SG Submarine Cable System Between the United States and France	
AMERICAN TELEPHONE & TELEGRAPH CO.	P-C-8277-1
Applications for Authority To Acquire and Operate Circuits in the CANTAT-II Submarine Cable System Between Canada and the United Kingdom, and To Make Available Circuits in the TAT-6 SG Submarine Cable System Between the United States and France	
ITT WORLD COMMUNICATIONS INC.	T-C-2451-1
RCA GLOBAL COMMUNICATIONS, INC.	T-C-2453-1
WESTERN UNION INTERNATIONAL, INC.	T-C-2443-1
Applications for Authority To Acquire and Operate Circuits in the CANTAT-II Submarine Cable System Between Canada and the United Kingdom	

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted February 14, 1973; Released March 1, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

GENERAL

1. The Commission has under consideration a joint application filed on November 27, 1972 by American Telephone and Telegraph Company (AT&T), ITT World Communications Inc. (ITT Worldcom), RCA Global Communications, Inc. (RCA Globcom), and Western Union International, Inc. (WUI), requesting modification

109-030—73——1

of the Commission's Memorandum Opinion, Order and Authorization adopted July 7, 1972, *American Telephone & Telegraph Co. et al.*, 35 F.C.C. 2d 801 (Decision).

2. The subject application was listed on the Commission's December 4, 1972 Public Notice of Applications Accepted for Filing. Copies thereof, together with notices extending the opportunity to file comments, were mailed to the parties required to be served by statute and to other interested parties. No comments were received.

3. The Commission, in its July 7, 1972 Decision, *inter alia*, authorized:

a. AT&T to

(1) acquire, on an ownership basis, 476 whole circuits and 1,849 half circuits in the TAT–6 cable system,

(2) acquire, on an IRU basis, a half interest in 150 circuits in the CANTAT–II cable system for a period up to and including the year 1979, and

(3) make available the whole interest, on an IRU basis, in up to 150 circuits to COTC and the BPO, and COTC and the French PTT, until the end of 1979, on condition that it has the option to repurchase such circuits at or prior to that time and further that any exercise of that option shall be conditioned on the proportionate reacquisition by COTC of CANTAT–II circuits held by U.S. carriers;[1] and

b. ITT Worldcom, RCA Globcom and WUI to each

(1) acquire, on an ownership basis, 26 whole circuits and 89 half circuits in the TAT–6 cable system, and

(2) acquire, on an IRU basis, a half interest in 20 circuits in the CANTAT–II cable system for a period up to and including the year 1979.

In addition, the Commission placed 247 whole circuits and 912 half circuits in the TAT–6 cable system in a reserve pool, to be held jointly by AT&T, ITT Worldcom, RCA Globcom and WUI for subsequent allocation by the Commission on showing of future needs and concurrence of appropriate foreign entities.

The Decision further specified that the capital and other costs related to the circuits to be owned by United States entities should be borne by the applicants in the following proportions: AT&T, 86.88%; and the three record carriers (ITT Worldcom, RCA Globcom and WUI), 13.12% in equal shares.

4. At the time of our Decision, the expected participants in the TAT–6 cable system had not arrived at a definitive agreement covering the construction, operation and maintenance of the cable. Since that time the participants had approved such definitive agreement (a copy of which is attached to the instant application), which varies in several material respects from the previous *pro forma* agreement between the participants. These changes have led applicants to file the present application requesting concomitant changes in our Decision.[2]

5. We had noted in our Decision that the CEPT countries had proposed that they acquire an "ownership" in 50% of the TAT–6 cable

[1] We intended that these circuits be authorized to AT&T, separately from the circuits authorized in the preceding paragraphs, so that it could dispose of them by IRU and retain ownership. As will be seen *infra*, these circuits are now proposed to be taken from half circuits assigned to AT&T for service with the U. K., rather than whole circuits to be assigned to AT&T for use with non-CEPT countries. (See para. 8, footnote 9, and paras. 54–56 of our Decision.)

[2] The agreement is at last at least 30 years and is terminable by any party on not less than two years' written notice expiring at the end of the initial period or thereafter.

system. Since that time the TAT–6 participants have agreed on such an approach, with the other 50% to be "owned" by United States participants. Allocations of each 50% ownership interest are proposed to be made among the individual participants in each group in proportion to the amount of circuitry assigned under the agreement to such participant to the number of circuits assigned to its group as a whole. Thus, AT&T would have a 43.99594% ownership, and each of the three record carriers would have a 2.00135 ownership interest.[3]

6. Capital costs, as well as maintenance and operating costs, however, would be divided among the two groups in a different manner, with the Europeans bearing 38.3750% and the United States carriers bearing 61.6250%. Carriers are to share in any net proceeds, on liquidation of the cable system, on the basis of their capital contribution.

7. The assignment of costs is based on the allocation of circuitry to the respective participants; i.e., United States carriers are assigned 61.625% of total circuitry, and European parties will be assigned the remainder. Circuits are to be held on an IRU basis to the extent the percent of circuitry held by a United States carrier exceeds the percent of its cable system ownership with the corresponding ownership being held by the Europeans. In our previous Decision we had included (para. 8) a table showing a tentative agreed-on use of circuitry. The present tentatively agreed on definitive TAT–6 agreement contains the results of a review by the parties of such assignments, which, among other things, reflects our creation of a joint pool of circuits to be held by applicants. These results are shown in the attached table. The circuit numbers in the table are readily reconcilable with those shown in our Decision; however, it may be noted that the six circuits formerly under "nordic" are now apparently distributed among Denmark, Norway and Sweden, and that 223 circuits formerly included among those under "United Kingdom" are now added to the whole circuits to be held by United States carriers.[4]

8. The whole circuits shown on Line 18 in the table attached are intended primarily for use with countries other than those listed, but the carrier may use any such circuit with any country to which it is authorized. The European participants agree that each will make available to the others, and to telecommunications entities not parties to the agreement transit circuit facilities as may reasonably be required to extend circuits from the TAT–6 terminal, on terms no less favorable than those given to other international telecommunications entities for similar transit facilities. With respect to the pool half circuits shown in Column (h) of the table, assignment within the United States is made subject to concurrence by the appropriate European party as to its transfer for service to another country and the type of service for which it is to be used within the assigned country.

[3] The modifications to our Decision made herein will result in capital contributions by the United States carriers at variance with those set out in our Decision, as well as those set out in the proposed definitive agreement.

[4] We had originally indicated that COTC was to acquire a half interest in 21 circuits for use with Spain. It now appears that Spain will acquire the ownership of such circuits and give COTC an IRU in them.

On allocation of a pool circuit, the party to whom the circuit is allocated is to pay the other United States carriers on the basis of depreciated capital cost. The above assignment of circuits is to be reviewed in 1979, and unused circuits will be reassigned in conformance with expected use, subject to appropriate regulatory authorization in the case of United States carriers. Entities, not parties to the agreement, to whom IRU's are given are to be required to participate in circuit assignment reviews. Any party to whom a circuit is assigned may make such circuit available to another telecommunications entity, by other than ownership transfer, subject to concurrence of the party to whom such circuit may be jointly assigned.

9. In our Decision we had authorized (first ordering clause, para. (e)) AT&T to dispose of up to 150 whole circuits in TAT–6 to COTC and to either or both the BPO and the French PTT, until the end of 1979, on condition it have the option to repurchase such circuits at or prior to that time, with such repurchase being concomitant with a simultaneous proportionate reacquisition by COTC of CANTAT–II circuits authorized in our Decision to U.S. carriers. Since that Decision, AT&T, on the basis of negotiations with the BPO and COTC, proposes that such 150 circuits are to be 150 of the 312 circuits jointly held by AT&T and the BPO; that its agreement to dispose of IRU's in its half interest in such 150 circuits extend for the life of the TAT–6 cable agreement; and that AT&T and COTC may, subject to appropriate governmental authorization, agree to the transfer of IRU in any or all such 150 circuits before the end of such period, with an option to the BPO to either retain the eastern end of such circuits or dispose of them to AT&T for service with countries other than the United Kingdom.[5]

10. The CANTAT–II circuits above referred to consisted of up to 150 such circuits we authorized AT&T to acquire from COTC on an IRU basis for service with the United Kingdom and France, and up to 20 such circuits we authorized each of the record carriers to acquire from COTC on an IRU basis for service with European points for the period up to and including 1979. (See Decision, second ordering clause.) AT&T's acquisition of such circuits was conditioned on its disposing to COTC IRU interests in an equal number of TAT–6 circuits referred to above. AT&T, the BPO, and COTC have now agreed that such circuits are to be used for service with the United Kingdom, and that AT&T's period for holding such circuits (to be acquired at proportionate capital cost at the time CANTAT–II becomes operational) last until a new transatlantic submarine facility after TAT–6 becomes operational. At such time they will revert to COTC at depreciated capital cost. However, AT&T and COTC can agree that the grant as to any such circuit be terminated earlier, or later, than specified, subject to appropriate government approval.

11. COTC has agreed that the number of CANTAT–II circuits held by AT&T and the number of TAT–6 held by COTC shall be

[5] We are informed that AT&T and the BPO are holding further discussions which may result in further modifications of the agreement with respect to these circuits. See para. 21 below.

the same, unless otherwise agreed subject to appropriate government approval.

12. AT&T has also agreed that it will use 300 of the 626 whole circuits to be assigned to it under the proposed definitive TAT–6 agreement for service with Israel, with the Israeli Administration acquiring half interests (on a proportionate capital cost basis) in such circuits by IRU starting at the time TAT–6 becomes operational, AT&T, in the application, states that 150 of these half circuits are in the 150 whole circuits it originally had proposed to make available to COTC; however, the BPO recently maintained that it had intended the latter company take IRU's in the AT&T interest in 150 jointly held AT&T/BPO circuits.

APPLICANTS' REQUESTS

13. The subject application requests that the Commission amend its July 7, 1972 Decision to:

a. Authorize AT&T to acquire, on a capital contribution basis, a total of 626 whole circuits in the TAT–6 cable system instead of the 476 whole circuits it is now authorized to acquire, and to make consequent changes in percentages of capital and other costs relating to pool circuits;

b. authorize AT&T to make available to COTC a half interest, on an indefeasible right-of-user (IRU) basis, in up to 150 circuits in the TAT–6 cable for the term of the TAT–6 Construction Agreement unless AT&T and COTC agree to terminate the IRU grant sooner, and subject to further approval of the Commission in the event of such agreement by AT&T and COTC for AT&T to reacquire all or any of such circuits, and to use, at the option of the British Post Office, the reacquired circuits jointly with the British Post Office for service between the United States and the United Kingdom or alternatively for AT&T to reacquire the British Post Office's half interest in the circuits, which circuits will then be used for service between the United States and such countries as AT&T may determine, subject to approval of the Commission;

c. authorize AT&T to acquire from COTC, on an IRU basis, a half interest in 150 voice-grade circuits in the CANTAT–II cable for use in providing jointly with the British Post Office communication service between the United States and the United Kingdom until a new transatlantic submarine facility, after the TAT–6 cable system, is placed in operation, and at that time to relinquish the IRU interest in the circuits to COTC;

d. authorize AT&T to make available to the Israeli Administration, on an IRU basis, 300 half circuits in the TAT–6 cable system for use jointly with AT&T in providing service between the United States and Israel, and to use AT&T's half of such circuits for that purpose;

e. authorize the international record carrier applicants to acquire their IRU interests in the CANTAT–II circuits, and to use such circuits, without limitation to the period to and including 1979 as now provided in the TAT–6 Order; and

f. authorize the applicants to agree that the European parties collectively shall have a 50% ownership interest in the cable portion of the TAT–6 cable system although collectively they will contribute 38.3750% of the capital, operating and maintenance costs of such portion.

DISCUSSION

14. In their initial applications for authorization to participate in the construction and operation of the TAT–6 submarine cable, the joint applicants herein proposed, as had been the case in previous cable projects, that ownership of the cable be based on use. While the Commission had received a message from the Austrian Minister of

Transport, containing a copy of a resolution adopted at the 4th Conference of European Ministers of Posts and Telecommunications held in Vienna in April 1972 which proposed that the eastern half of the TAT–6 cable be owned by an aggregate of European countries, this proposal was not reflected in such applications. In the interest of expediting this project, we acted without awaiting any possible amendments to the applications which might address the view of the European entities. The joint applicants now seek modification of our Decision so as to permit implementation of such proposal.

15. The application for modification now before us proposes that 50% of the ownership of the TAT–6 cable be assigned to the joint applicants in the aggregate and the remaining 50% be assigned to the 16 European countries which have elected to participate in the TAT–6 cable on an ownership basis.[6] The joint applicants further propose that the 50% ownership assigned to them in the aggregate be apportioned among them on the basis of use made of the cable.[7] Under the proposal before us, the joint United States applicants will have in the aggregate 50% of the voting rights and the European parties the remaining 50% in the aggregate. Each individual European or United States party will be assigned its portion of the 50% of the voting rights on the basis of its use of the TAT–6 cable.

16. The proposed assignment of equal shares of ownership in the TAT–6 cable system to the joint United States applicants in the aggregate and the 16 European parties in the aggregate is not based on either initial or ultimate use or capital contribution to the construction of the system. Instead, it is set at this ratio primarily to achieve parity between the voting rights of the United States parties and the European parties. The capital contribution, on the other hand, under the proposed contract is based on the use each party estimates it will make of the cable. Under the current proposal the United States parties will jointly contribute 61.6250% of the construction and operating costs of the cable but will retain 50% of the ownership and voting rights relating thereto.

17. The Commission recognizes that there is merit to the position that all of the entities at the eastern end of the TAT–6 cable should collectively have a 50% ownership and associated voting rights. Such entities as a group will ultimately operate the foreign end of the circuits and collectively contribute 50% of the investment. The proposal before us now, however, does not involve all of the ultimate users at the eastern end of the cable, but includes only the CEPT countries which collectively account for about three-fourths of the projected circuit use at the eastern end. We appreciate the considerations which led the CEPT countries to seek the 50% ownership and voting status; that is, the view that the entities at the eastern end of the cable should

[6] The European countries participating on an ownership basis are Austria, Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

[7] Applicants indicate, as does the draft contract attached to the subject application as an appendix, that the European parties plan to assign the 50% ownership in the cable assigned to them in the aggregate among the 16 countries on the basis of use made of the TAT–6 cable.

have equal status with those at the United States end as owners and voters. However, the TAT–6 cable is not simply a facility to handle traffic between the United States and Europe, but is the transatlantic portion of a facility to be also used for handling traffic to points beyond the territories of the CEPT countries and even beyond Europe itself to Africa, the Near East and the Middle East, and in the future even beyond. It would appear to us that in the usual course of events all carriers using the eastern end should have the same status vis-a-vis the United States carriers.[8]

18. We recognize, however, the special circumstances involved herein, the initiative of the CEPT countries in the negotiation of the agreement for TAT–6, and the many discussions which preceded the instant contract. Accordingly, we will not interpose any objection to the proposal which would accord the CEPT countries as a group a 50% ownership and voting rights in TAT–6, provided that the United States carriers retain certain of the indicia of ownership, that is, rights in the physical property and the right to dispose of the eastern end of whole circuits to non-CEPT countries which, as the agreement recognizes, shall enjoy transit rights and pay charges substantially similar to those applicable between and among CEPT countries with respect to the use of TAT–6 circuits. We also interpose no objection herein to the proposal that the United States carriers hold indefeasible right of use in those circuits in the TAT–6 cable system assigned in which they invest but do not hold an ownership interest,[9] provided it is clearly specified that such indefeasible right of user carries with it the rights specified herein above in this paragraph and provided further that, as specified in the application and appended contract, on liquidation of the TAT–6 cable system, the joint applicants, as well as the European parties, will share in any net proceeds on the basis of their capital contributions.

19. In its original application for authority to acquire circuits in the CANTAT–II cable system, AT&T requested authority to acquire one-half interests in 150 voice circuits in said cable on an IRU basis until the end of 1979, at which time such interests were to be reconveyed to COTC. It was proposed that AT&T would at that time reacquire its 150 wholly owned TAT–6 voice circuits which it sought to make available to COTC, the BPO and the French PTT for their use in providing service between the United Kingdom and Europe. We authorized AT&T to acquire the requested interests in the 150 CANTAT–II circuits until the end of 1979 and to make available 150 wholly owned

[8] We anticipate that, with respect to any future transatlantic cables, the United States carriers will negotiate from the outset with all entities who will own the foreign end of the cable, so that each such entity may be in position to make a financial contribution, *ab initio*, commensurate with its anticipated use. If there are so many foreign entities involved that the negotiations would become unduly complex, we anticipate, as an alternative, the United States carriers will provide in the basic contract with their foreign partners that, as the United States entities sell off the foreign half of their whole circuits, separately retained ownership and voting rights would be transferred to the purchasers, so that ultimately 50% of the cable would be owned and paid for by entities at the foreign end.

[9] It does not appear from the draft contract appended to the instant application that circuit ownership interests and indefeasible right-of-user interests held are identified with any specific circuitry.

circuits in the TAT–6 cable system to COTC, the BPO and the French PTT. We also limited acquisition of indefeasible rights of user in the interests in CANTAT–II circuits acquired by the record carrier applicants herein to a period terminating at the end of 1979. In their instant application the joint applicants request authority with respect to those CANTAT–II and TAT–6 circuits as set forth in subparagraphs 4 (b), (c) and (e) *supra*.

20. We found in our TAT–6 Decision that CANTAT–II could not be considered a prime source for meeting traffic demands to or from the United States. However, we did find that a reasonable use of that facility for the limited time proposed by AT&T would be useful in assuring diversity of facilities over one of our heaviest international traffic routes. We, therefore, authorized AT&T and the record carriers to make limited use of CANTAT–II circuits until the end of 1979 as proposed by AT&T. AT&T now proposes that it be permitted to make such use of CANTAT–II circuits until a new transatlantic submarine facility, after the TAT–6 cable, is placed in operation. The record carriers request that they be permitted to make use of the CANTAT–II circuits they have been authorized to acquire without limitation as to time.

21. We retain the opinion expressed in our TAT–6 Decision that, while the CANTAT–II cable system cannot be considered as a prime source for meeting traffic demands to or from the United States, limited use of that facility will be useful in assuring diversity of facilities. A consideration inherent in determining the period of time that CANTAT–II will be useful in providing diversity is the availability of additional transatlantic facilities. We originally accepted the AT&T proposal that use of CANTAT–II circuitry until the end of 1979 was reasonable. Since at the time of our Decision we were aware of the possibility that another transatlantic cable would be applied for in the latter part of the decade, we believe that it is now appropriate to permit the use of the CANTAT–II circuits joint applicants have been authorized to acquire until we have reached a decision on any application filed by AT&T or by the joint applicants for a transatlantic submarine facility subsequent to TAT–6 or, if no such application is filed by that date, until December 31, 1980.[10] In either event the joint applicants may apply for such extension of time to make use of their CANTAT–II circuits as they may feel they can justify as being in the public interest.[11]

22. In paragraph 18 above, we noted that, contrary to their original intent, AT&T and the BPO now contemplate that the 150 TAT–6 circuits to be temporarily taken by COTC are to come from circuits jointly assigned to AT&T and the BPO rather than from wholly owned circuits to be assigned to AT&T. We are not interposing any objection

[10] As noted above (footnote 5), we understand negotiations between AT&T and the BPO on this point are still in progress and that the parties may further modify their proposal. To the extent such modified proposal is not covered by our Order herein, we shall consider an appropriate petition for modification on its merits.

[11] We are constrained to grant this relief because of agreements entered into between AT&T and the owners of CANTAT–II for the protection of AT&T in case of a catastrophic failure or degradation of that cable.

to this change in the interest of comity and accommodation with AT&T's British correspondent. However, we believe it necessary to express our concern lest the decrease in the contemplated use of TAT–6 for United States/United Kingdom telephone traffic adversely affect the diversity sought by the parties between primary cable and satellite routes. We would expect that AT&T, a strong proponent of such position, will bear this in mind in connection with its negotiations regarding the ultimate use of TAT–6 circuits if and when AT&T seeks authority to reacquire the western end of these 150 circuits now made available to COTC on an IRU basis.

23. Our circuit allocations in the Decision, as well as herein, will result in no change in the total investment by United States carriers in the TAT–6 cable system. However, since we have allocated investment in the pool circuits between AT&T and the record carriers in the same proportion as we have assigned equivalent half circuits (see Appendix B) to such carriers, and since we have assigned to AT&T 150 additional whole circuits not reflected in our Decision, the investment among United States carriers must be recalculated. Thus AT&T will now contribute 54.225% of the total capital contribution of the TAT–6 cable system or $78,626,250, and the United States record carriers as a group will contribute 7.40% of the total capital costs or $10,730,000.

24. In view of the foregoing, we shall amend the appropriate ordering clauses of our TAT–6 Decision to grant the requests made by the joint applications to the extent discussed above.

25. Accordingly, IT IS ORDERED, that the subject joint application of American Telephone and Telegraph Company, ITT World Communications Inc., RCA Global Communications, Inc., and Western Union International, Inc., IS GRANTED IN PART; and

(A) The first ordering clause of the Memorandum Opinion, Order and Authorization (Decision) herein adopted July 7, 1972, is amended to read as follows:

(a) Applicants are authorized to make capital contributions to the system in the amounts specified in para. 23 herein, with the ownership of the cable portion of the system being held 50% by applicants collectively and 50% by their foreign partners collectively so as to secure equality of voting rights as between the two groups, PROVIDED, HOWEVER, that

(1) circuits in such cable system acquired by applicants in excess of 50% of the total circuitry in the system shall be held by applicants on an indefeasible right of user basis, with applicants having the same rights with respect to the physical property represented by such excess as if they had ownership interests in such excess,

(2) applicants shall have the right to use such circuits as if they had ownership interest in all circuits assigned to them in such cable system, and

(3) ownership allocated collectively to applicants shall be divided among them in proportion to the relation the capital contribution of each bears to the total capital contribution made by all applicants;

(b) AT&T is authorized to acquire on a capital contribution basis 626 whole circuits and 1,849 half circuits in the TAT–6 cable, and to use such circuits to provide the communication services it is now authorized to provide between the United States and Europe and points beyond;

(c) RCA, ITT and WUI are each authorized to acquire on a capital contribution basis 26 whole circuits and 89 half circuits for a total of 78 whole circuits and 267 half circuits, and to use such circuits to provide the communication

services they are now authorized to provide between the United States and Europe and points beyond; and

(d) the remainder of the circuits requested by the U.S. carriers, as shown in para. 59 and Appendix C herein, namely 247 whole circuits and 912 half circuits, shall be held jointly in a reserve pool for subsequent allocation by the Commission upon showing of future needs and concurrence and other costs related to the pool circuits shall be borne by the applicants in the following proportions: AT&T, 87.9966%, and the three record carriers (RCA, ITT and WUI), 12.0034% in equal shares.

(e) When a given applicant acquires an interest, on a capital contribution basis, in any circuit initially allocated to another applicant or acquires one of the circuits in the reserve pool, the reimbursement to the other applicant(s) shall be on the basis of depreciated original cost (or the pro rata accumulated cost of such circuit if the system is not then operational); and

(f) AT&T is authorized to make available to COTC, on an IRU basis, AT&T's interest in 150 of the 312 TAT–6 circuits assigned jointly to AT&T and the BPO.

(B) Subparagraphs (a) and (b) of the second ordering clause of the Decision are amended to read as follows:

(a) AT&T is authorized to acquire on an IRU basis a half interest in up to 150 CANTAT–II circuits and operate them until the Commission's decision on an application for a transatlantic submarine facility subsequent to TAT–6 is issued or the end of 1980, whichever first occurs, subject to the conditions that (1) AT&T and COTC have agreed that COTC will acquire from AT&T an IRU interest in the same number of TAT–6 circuits by the date the TAT–6 cable becomes operational, and (2) AT&T shall at no time thereafter retain or operate a greater number of the CANTAT–II circuits than the number of TAT–6 circuits retained or operated by COTC unless and until the Commission grants authority to do otherwise upon an appropriately supported application;

(b) RCA, ITT and WUI each are authorized to acquire on an IRU basis a half interest in 20 CANTAT–II circuits (for a total of 60 such circuits) for service until the Commission's decision on an application for a transatlantic submarine facility subsequent to TAT–6 is issued or the end of 1980, whichever first occurs, to provide the communication services they are above authorized to provide between the United States and Europe.

(C) AT&T is hereby authorized to assign up to 300 whole circuits it is authorized to acquire to the provision of service between the United States and Israel and, upon compliance with the third ordering clause of our Decision, make available to its correspondent in Israel, on an IRU basis, one-half interests in up to 300 TAT–6 circuits.

(D) All other terms and conditions of the Decision remain the same.

(E) Except to the extent granted hereinbefore, the subsequent joint application of AT&T, ITT Worldcom, RCA Globcom and WUI, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Appendix A

TABLE

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
						Assigned United States		
European party	A.T. & T.	ITT	RCA	WUI	CTNE	Total	Pool	Total
1. Austria	19	3	3	4		29	20	49
2. Belgium	95	7	7	8		117	61	178
3. Denmark	16	1				17	5	22
4. France	322	15	12	12		361	147	508
5. Finland	11					11	3	14
6. Germany	301	12	15	12		430	165	595
7. Greece	63	1	1	2		67	24	91
8. Ireland	38					38	10	48
9. Italy	237	6	6	7		256	92	348
10. Netherlands	95	5	6	5		111	49	160
11. Norway	16		1			17	5	22
12. Portugal	38	1	1	1		41	16	57
13. Spain	87	10	7	10		114	66	180
14. Sweden	14			1		15	5	20
15. Switzerland	95	10	13	8		126	74	200
16. United Kingdom	312	18	17	19		366	170	536
17. Subtotal	1,849	89	89	89		2,116	912	3,028
18. Whole circuits	626	26	26	26	21	725		725
19. Whole circuits							247	247
20. Total	2,475	115	115	115	21	2,841	1,159	4,000

F.C.C. 73-233

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REQUEST BY CITIZENS COMMUNICATIONS CENTER For Inspection of Annual Financial Reports	File No. BRCT-64

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration: (a) the Memorandum Opinion and Order (FCC 72-1068) adopted on November 29, 1972; released on December 1, 1972; (b) a "Petition for Reconsideration" [1] and a "Request for Stay" [2] of the above ruling which were filed on December 4, 1972 by Metromedia, Inc. (hereinafter "Metromedia," "KTTV," "the station" or "the licensee"): and (c) a "Response to Petition for Reconsideration" filed on December 26, 1971 by the Citizens Communications Center (hereinafter "CCC," "the petitioners to deny" or "the petitioners") on behalf of the National Association for Better Broadcasting, Action for Children's Television, Mexican American Political Association, and the Fair Housing Council of the San Fernando Valley.[3]

2. The pertinent background of petitioner's request for information is set forth fully in the Commission's Memorandum Opinion and Order issued on December 1, 1972 and in the Executive Director's Ruling of July 24, 1972, and there is no need to restate it here. The only ground urged by Metromedia for reconsideration and stay of the Commission's determination to make the requested information available to the petitioners is the Commission's inadvertent failure to consider Metromedia's Reply pleading.[4] Section 1.115(d) of the rules

[1] The "Petition for Reconsideration" transmits a copy of the licensee's "Reply to 'Opposition to Petition for Review' " submitted on October 5, 1972.

[2] The "Request for Stay" asked for a delay to enable the Commission to consider the arguments made in Metromedia's reply pleading. The Commission has now considered the reply pleading and accordingly there is no longer any necessity to grant the "Request for Stay."

[3] Counsel for Metromedia consented to a late filing of this pleading and petitioners filed a consent motion with the Commission on December 26, 1972 requesting that the Commission permit its Response in the instant matter to be filed a few days late.

[4] This pleading captioned "Reply to 'Opposition for Review' " was timely filed by Metromedia on October 5, 1972 but because of an inadvertent mistake in routing, the pleading did not come to the Commission's attention until after issuance of our ruling denying Metromedia's "Petition for Review" and affirming the Executive Director's action authorizing CCC to inspect the requested financial reports.

provides that reply pleadings may be filed in connection with application for review proceedings and Metromedia was clearly entitled to have its pleading considered in the context of the other pleadings filed in this matter.

3. Contrary to Metromedia's allegations, however, we do not believe that there is anything in its Reply pleading that would warrant a reconsideration of our decision to make the requested 324's available to CCC. We have considered all the arguments presented in Metromedia's Reply and have determined that the arguments it presents are basically no different from those Metromedia originally made to the Executive Director and to the Commission in its "Petition for Review". In addition, the Commission's Order in this matter has specifically considered and responded to every one of the arguments advanced in the "Petition for Review" and restated in the "Reply to Opposition." [5]

4. Further, we believe that the public interest would be served by permitting an early inspection of the requested material. Metromedia's "Request for Stay" points out that under Section 0.461(d)(2) of the rules, the Commission may find ". . . for reasons set forth in the order, that the public interest requires earlier inspection," but that the Commission's Order in this matter did not make such a finding. It is clear now, however, that it would be in the public interest for the Commission to expedite implementation of the instant request for information. Over eight months have elapsed since the petitioners to deny requested this information, and petitioners' request for the annual financial reports was granted in order to enable them to fully support their petition to deny. Until the requested information has been made available to petitioners, the Commission's disposition of the renewal application will be delayed.

5. Accordingly, IT IS ORDERED, THAT the "Petition for Reconsideration," filed on December 5, 1972 by Metromedia, IS DENIED, and that the request for inspection made in the "Response to the Petition for Reconsideration" IS GRANTED. IT IS FURTHER ORDERED, pursuant to Section 0.461(d)(2) of the rules and for the reasons set forth under paragraph 4 of this order, that the "public interest requires earlier inspection." The request for information shall not be implemented until the licensee has been afforded the opportunity to obtain a judicial stay of this order, provided that judicial review is sought and a judicial stay is requested within 30 days of release of this opinion. Arrangements for inspection may be made with the Office of the Executive Director.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[5] We recognize that Metromedia's Reply was directed to specific rebuttal of the arguments in CCC's Opposition, and that our ruling did not address itself to CCC's contention that some of Metromedia's arguments were procedurally deficient because they had not been made below. There is of course no need to consider these arguments now because we dealt with all of Metromedia's arguments on the merits. It should also be noted that petitioners have conceded at page 5 of their "Response for Reconsideration" that they were in error in contending that one of these arguments had not been made below.

F.C.C. 73R–98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ALBERT L. CRAIN, HUMBLE, TEX.	Docket No. 19186 File No. BP–17550
ARTLITE BROADCASTING CO., HOUSTON, TEX.	Docket No. 19187 File No. BP–17577
JESTER BROADCASTING CO., NASSAU BAY, TEX.	Docket No. 19188 File No. BP–17579
SPACE CITY BROADCASTING CO., HOUSTON, TEX.	Docket No. 19189 File No. BP–17871
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER CONCURRING WITH STATEMENT. BOARD MEMBER NELSON DISSENTING WITH STATEMENT.

1. This proceeding involves four mutually exclusive applications for new standard broadcast stations at Humble, Texas (Albert L. Crain, hereafter "Crain"); Houston, Texas (Artlite Broadcasting Company, hereafter "Artlite" and Space City Broadcasting Company, hereafter "Space City"); and Nassau Bay, Texas (Jester Broadcasting Company, hereafter "Jester"). By Commission Order, FCC 71–321, 28 FCC 2d 381, released March 31, 1971, these applications were designated for hearing on various issues including, *inter alia*, an issue to determine whether the proposals of Crain and Jester will realistically provide a local transmission facility for their specified communities or for another larger community (Suburban Community issue). By Order, FCC 72M–172, released February 7, 1972, Chief Administrative Law Judge Arthur A. Gladstone granted a joint request for approval of agreement, filed by the parties prior to hearing, looking toward grant of the Artlite application and dismissal of the others; publication pursuant to Rule 1.525(b) was not required. Now before the Review Board is the Broadcast Bureau's appeal,[1] filed March 6, 1972, which challenges the Judge's dismissal of the Jester application without requiring publication.[2]

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[1] Also before the Board are oppositions, filed January 10, 1973, by Jester, Artlite, Crain and Space City; a supplement to opposition, filed January 15, 1973, by Jester; and a reply, filed January 17, 1973, by the Broadcast Bureau.

[2] The proceeding is before the Board on remand pursuant to Commission Order, 38 FCC 2d 515, released December 8, 1972. In a previous Memorandum Opinion and Order, 33 FCC 2d 893, released March 9, 1972, the Board had dismissed the Bureau's appeal on the grounds that it did not comply with the procedural requirements of Rule 1.302. In its remand Order, the Commission set aside the Board's holding, waived the provisions of Rule 1.302 and remanded the Bureau's appeal to the Board for a ruling on the merits.

2. In his ruling published February 7, 1972, the Chief Administrative Law Judge held that publication by Crain was unnecessary because Humble, Texas was a "captive enclave" of Houston, could not grow geographically, and was not a "developing and deserving" community within the meaning of the *Policy Statement on 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965). The Judge reached a like conclusion with respect to the Jester proposal. He held that, while Nassau Bay was not a captive enclave of Houston, it was so situated as to make it likely that any applicant for Nassau Bay would have to serve the "Clear Lake area",[3] as well as Houston. Indeed, such an application, the Judge reasoned, would in actuality be designed to serve the Houston Metropolitan Area "as a matter of technical and economic necessity." The Judge went on to note that the need for a first local outlet at Nassau Bay was satisfied by the existence of FM Station KLYX in Clear Lake City. The Judge concluded from the showing with respect to the integration of Nassau Bay into the Clear Lake area that the Jester application was really one designed to serve the Clear Lake area, which has a transmission facility, and not merely the community of Nassau Bay. Finally, the Judge distinguished *Sundial Broadcasting Co., Inc.*, 18 FCC 2d 86, 16 RR 2d 459 (1969), upon which the Bureau placed principal reliance, on the grounds that, unlike here, the applications in that case were for communities in distinct metropolitan areas, and there was no significant service overlap of the two proposals.

3. In its appeal, the Bureau takes the position that Nassau Bay, unlike Humble, is a developing and deserving community within the meaning of the Commission's 1965 *Policy Statement*, *supra*.[4] Appellant asserts that the Presiding Judge, in effect, concluded that no applicant for Nassau Bay could rebut the Suburban Community presumption, and that neither the size and location of Nassau Bay nor the fact that Jester surveyed the needs of persons residing in the Clear Lake area and proposed to serve that area support his conclusion.[5] The Bureau argues that the Jester application specified Nassau Bay as its station location, and that neither the Judge nor Jester can now claim that the application is in reality one for the Clear Lake area or the Houston Metropolitan Area (citing *Sundial Broadcasting Co., Inc.*, *supra*, and *Five Cities Broadcasting Company, Inc.*, 35 FCC 501 (1963)). Appellant also argues that the Judge erred in not according due significance to the fact that Nassau Bay has no local transmission

[3] The Judge noted that the designation Order states that the Nassau Bay application contains a population estimate for this area "of which Nassau Bay is apparently a part." (Paragraph 11 of the designation Order.) The area population given, the Judge noted, was 35,000, whereas, the population for Nassau Bay was listed as 3,000. The Judge further pointed out that the 1970 U.S. Census does not list these communities separately from Webster District in which they are located, but shows Webster District as part of the Houston Urbanized Area and SMSA. The applicants argued before the Judge that the Jester application treated the needs of Clear Lake City and Nassau Bay as substantially identical and proposed to serve the entire Clear Lake area. No further clarification of this point is provided in the pleadings before the Board.

[4] The Bureau notes that material in the Jester application indicates that Nassau Bay is likely to grow in size and population.

[5] The Bureau points out that survey efforts beyond the community of license are in compliance with question and answer 6 of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

service. Even if the Clear Lake area FM station is considered as providing a transmission service to Nassau Bay, the Bureau continues, the need for a competitive voice outweighs the need for an additional outlet to Houston since Houston is already well-served. Finally, the Bureau contends, even though the remaining applicant, Artlite, will provide a reception service to Nassau Bay, the objectives of 307(b) require that other parties be afforded the opportunity through publication to provide Nassau Bay with its first local outlet.[6]

4. In opposition,[7] Jester takes the position that Nassau Bay is akin to Humble in that it is locked in geographically within the Houston SMSA with little or no potential for growth. Specifically, Jester asserts that Nassau Bay constitutes an area of 756 acres and is restricted from expansion on all sides by entities or bodies of water. The applicant submits a land map of the area in support of this assertion.[8] Jester also alleges that the most recent 1972 U.S. Census figures show that Nassau Bay is declining in population. Jester submits that the size and location of Nassau Bay are significant to a 307(b) determination and alleges that there is a population ratio of 325 to 1 between Houston and Nassau Bay and, furthermore, that its proposal would place a 5 mv/m signal over 70% of Houston and a 2 mv/m signal over the remainder. In these circumstances, Jester submits that a reasonable conclusion may be drawn that Nassau Bay is so integrated into the Houston metropolitan area that no applicant could rebut the Suburban Community presumption. Jester also disagrees with the Bureau's reliance on *Sundial Broadcasting Co., Inc., supra*, and attempts to distinguish that case as involving the dismissal of an application which would have deprived the community of Parma of all service, both transmission and reception. In this case, Jester argues, 307(b) preferences for Nassau Bay are not significantly involved or, at most, the objectives of 307(b) are not unduly impeded (citing *Huntington Broadcasting Co.* v. *FCC*, 192 F. 2d 93, 7 RR 2031 (1951); and *Howard M. McBee*, 19 FCC 2d 800, 802, 17 RR 2d 351, 354–5 (1969)). With specific regard to the latter contention, Jester alleges that all areas and populations that would receive 2 mv/m service from Jester will receive such service from Artlite, and that the same is true for 0.5 mv/m service with the exception of small areas, none of which is underserved. Moreover, Jester contends, the surviving Artlite proposal represents a more efficient use of the frequency than that proposed by Jester and would extend a 5 mv/m signal over all of the communities specified by Jester. For all these reasons, Jester concludes, dismissal of its application would not unduly impede the objectives of 307(b).[9]

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[6] The Bureau disagrees with the Judge's interpretation of *Sundial Broadcasting Co., Inc., supra*. It argues that the significant factor in that case was not the loss of an additional reception service, but the fact that the withdrawal of the Parma application would result in a loss of a transmission service to that community.

[7] Artlite joins in and supports Jester's opposition.

[8] In its supplement to opposition, Jester states that the land area described on its map was incorporated on April 2, 1970, and argues that this adds to Nassau Bay's lack of growth potential.

[9] In his opposition, Crain supports Jester's pleading, and opposes the Bureau's position for the reasons set forth by the Judge, for the reasons stated in his opposition to the Bureau's application for review, filed with the Commission, and because he believes the Bureau's support of dismissal of the Humble application and opposition to dismissal of the Jester application are inconsistent. In its opposition, Space City notes the filing of the Jester pleading and, in order to avoid unnecessary repetition of arguments, simply supports the Judge's ruling.

5. In reply, the Bureau reiterates its assertion that the objectives of Section 307(b) would be disserved by a dismissal without publication of Jester's application, and contends that Jester's arguments in opposition are in conflict with the reasoning of the Chief Administrative Law Judge. Specifically, the Bureau points out, the Judge allowed dismissal without publication because he believed the area was already served by a transmission facility (a Clear Lake City), whereas Jester is of the view that Nassau Bay's geography and population characteristics disqualify it as a developing and deserving community. The Bureau asserts its disagreement with both positions and urges that the Board grant its appeal.

6. The Bureau's appeal will be granted. The Judge reasoned and the applicants argue before us that publication is unnecessary because neither Jester nor any other applicant for a facility at Nassau Bay could successfully rebut the presumption that it is, in fact, an applicant for a Houston area station. We disagree. The Commission's *Policy Statement* on 307(b) makes clear that the presumption is rebuttable but, without an adequate record, and based merely on the allegations before us, we cannot conclude that the situation in this case presents an impossible burden for any Nassau Bay applicant. The arguments that Nassau Bay is locked in geographically and not growing in population are disputed and inconclusive. Indeed, in seeking to avoid specification of a Suburban Community issue against it, Jester argued before the Commission that Nassau Bay was inadequately served by stations in other communities and that sufficient resources existed in that community to provide revenues without depending on Houston. Jester specifically cited growth in the number of business establishments and increase in public school enrollment to establish the self-sufficiency and independence of its community. See paragraphs 12 and 14 of the designation Order. Furthermore, Jester's citation of coverage and population data relative to Houston simply reflects the reasons for designation of a Suburban Community issue to begin with. Given these factors, we believe it is premature to conclude that neither Jester nor any other applicant could establish that Nassau Bay is a deserving suburban community.

7. Both the applicants and the Bureau rely upon the holdings in *Sundial Broadcasting Co., Inc.* and *Howard M. McBee*, *supra*, which involved dismissing applicants against whom Suburban Community issues had been specified. In *Sundial*, the Commission ordered publication by the dismissing applicant for a facility at Parma, Ohio. The Commission held that because publication might evoke a new applicant which could rebut the presumption; because Parma had no local transmission service; and because Parma and Warren (the community proposed by the surviving applicant) had separate and distinct 307(b) needs, publication was required. These circumstances approximate our own facts and require a like result. Nassau Bay is without a transmis-

109-030—73——2

sion service,[10] is alleged by Jester to be independent of Houston, and dismissal without publication would deprive that community of an opportunity for a realistic local transmission service. The factors relied upon by the Judge and the applicants in distinguishing *Sundial* are nowhere articulated by the Commission in that case. In *McBee*, the Board did not require publication by the dismissing applicant, but there the surviving applicant's community and the county in which it was located were without a transmission facility, whereas the other community was served by nearby stations. This is in stark contrast to the Houston metropolitan area, in the case before us, which is well-served. In addition, as the Bureau points out, it may also be argued that the need for a first competitive voice in the "Clear Lake area" would outweigh the need for an additional voice in Houston.[11] Finally, the coverage contours referred to by Jester simply reflect that Artlite would provide a reception service to Nassau Bay, but do not answer the crucial point that Nassau Bay will be deprived of an opportunity for a first local transmission service. As stated in the *McBee* case, the Commission has held that the question of publication should be considered without regard to the Suburban Community presumption, but rather on the basis of the communities originally specified by the applicant. Applying this principle, and absent a hearing, the Board is simply not convinced that the choice of a Houston applicant over an applicant for Nassau Bay under a 307(b) determination would not unduly impede the objectives of Section 307(b). In sum, it is our view that dismissal of the Jester application without publication would result in the abandonment of a community for which another applicant could conceivably provide realistic service and would frustrate the purposes of Rule 1.525. Therefore, we shall grant the Bureau's appeal and we would order publication but for the fact that the agreement of the parties contains a provision at paragraph 3 thereof to the effect that it will be rendered null and void should publication be required of a dismissing applicant.[12] Therefore, we shall deny the joint request for approval of the agreement.

8. Accordingly, IT IS ORDERED, That the appeal from presiding officer's final ruling, filed March 6, 1972, by the Broadcast Bureau, IS GRANTED; and

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[10] Jester specified Nassau Bay as the community applied for, not Clear Lake City, the Clear Lake area, the Houston metropolitan area, or some other community. Without amendment, the application must be treated as one for Nassau Bay, not the other areas. *Cf. Risner Broadcasting, Inc.*, 20 FCC 2d 790, 17 RR 2d 1215 (1969); *Five Cities Broadcasting Co., Inc.*, 35 FCC 501 (1963). It follows, therefore, that, absent adduction of programming evidence, reliance by Jester and the Judge on the facility at Clear Lake City as providing a transmission service for Nassau Bay was misplaced. In addition, the Commission records establish that the antenna of FM Radio Station KLYX is located in Houston. By action of February 28, 1972, KLYX was authorized to change "studio and remote control location" to Houston subject, *inter alia*, to the origination of a majority of KLYX's programs, exclusive of recorded music programs, from its main studio in Clear Lake City. On June 7, 1972, KLYX was authorized to identify as "Clear Lake City-Houston". The current KLYX license (BLH–5372) specifies the main studio location at 2929 S. W. Freeway, Houston, Texas.

[11] The other authority relied upon by Jester is equally inapposite. *Huntington Broadcasting Co. v. FCC*, *supra*, preceded both the Suburban Community *Policy Statement* and the adoption of the publication requirements of Rule 1.525; the holding therein is not applicable to the situation before us.

[12] We need not address the situation in Humble, Texas, since our determination that publication of dismissal of the Nassau Bay application is required renders the agreement null and void.

9. IT IS FURTHER ORDERED, That the Chief Administrative Law Judge's Memorandum Opinion and Order, FCC 72M–172, released February 7, 1972, IS SET ASIDE; and

10. IT IS FURTHER ORDERED, That the joint request for approval of agreement for dismissal of applications, filed September 1, 1971, by Albert L. Crain, Artlite Broadcasting Company, Jester Broadcasting Company, and Space City Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

I concur in the result only of the Board's opinion here. Since the Commission's *Report and Order* (FCC 73–220) (Docket 18651), *In the Matter of Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards*, etc., was just recently released on February 28, 1973, the pleadings here, having been filed weeks prior thereto, could not have reached the basic question of the effect, if any, of these new rules and policies on the disposition of the subject matter; nor could the pleadings have reached the more specific questions posed in Board Member Nelson's dissenting statement. For this reason, I have not reached these questions in resolving the subject matter. *In my view*, if the parties desire to address themselves to these questions, they may do so by the filing of appropriate petitions for reconsideration—addressed to the Board—thereby protecting all of their due process rights. Perhaps an alternative course by the Board, *viz.*, a Board order requesting the parties to address themselves to the questions, if any, raised by the new rules and policies would have resulted in a more orderly and efficient dispatch of the Board's business, as compared with its action here: however, it must be apparent that a majority vote could not prevail for this alternative course of procedure.

DISSENTING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I dissent from the denial of the joint request on the grounds that (1) the petitioners have been denied due process by the Board's failure to afford petitioners the opportunity to invoke and to be heard with respect to the Commission's *Report and Order* (FCC 73–220) Docket 18651, released February 28, 1973, *In the Matter of Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards, etc.;* (2) the petitioners' appellate rights have been adversely affected since they have been denied the opportunity to invoke said *Report and Order* in any application for review hereafter presented to the Commission; (3) petitioners have been denied the opportunity to show that the required publication would be a vain act since, under the provisions of said *Report and Order*, it appears that no application by a new applicant for Nassau Bay would be acceptable for filing; (4) petitioners have been denied the opportunity to plead with respect to the question whether, in light of said *Report and Order*, any applicant can overcome the presumption under the *Suburban*

Community Policy; and (5) the petitioners have been denied the opportunity to plead with respect to the effect of the *Report and Order*, when considered with other factors, on the question whether a grant of the request "would unduly impede achievement of a fair, efficient and equitable distribution of radio service" as set forth in Section 1.525 of the Rules.

In light of all of the above, I would afford the parties herein the opportunity to submit further pleadings before considering the merits of the joint request.

F.C.C. 73-219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DUPAGE COUNTY BROADCASTING, INC., ELMHURST, ILL.	Docket No. 16965 File No. BP-16292
HOWARD L. ENSTROM AND STANLEY G. ENSTROM D.B.A. CENTRAL DUPAGE COUNTY BROADCASTING CO., WHEATON, ILL.	Docket No. 16966 File No. BP-16465
For Construction Permit	

DECISION

(Adopted February 21, 1973; Released March 1, 1973)

BY COMMISSIONER HOOKS FOR THE COMMISSION: COMMISSIONER JOHNSON AND H. REX LEE NOT PARTICIPATING; COMMISSIONER WILEY CONCURRING IN THE RESULT.

APPEARANCES

Morton L. Berfield, on behalf of DuPage County Broadcasting, Inc., *Robert W. Coll*, on behalf of Central DuPage County Broadcasting Company; and *Thomas B. Fitzpatrick*, *Michael W. Faber*, and *Philip V. Permut*, on behalf of the Chief, Broadcast Bureau.

BACKGROUND

1. This proceeding involves the mutually exclusive applications for a construction permit for a new Class II standard broadcast station on 1530 kHz filed by DuPage County Broadcasting, Inc. (DuPage) of Elmhurst, Illinois, and Central DuPage County Broadcasting Co. (Central) of Wheaton, Illinois.[1] Both applicants propose a daytime only operation utilizing a directional antenna system, with DuPage proposing a power of 250 watts and Central proposing a power of 500 watts.

2. By a Memorandum Opinion and Order, 5 FCC 2d 577, adopted November 2, 1966, we designated these applications for hearing. Thereafter, in an Initial Decision, 19 FCC 2d 259, issued July 23, 1968, Administrative Law Judge Isadore A. Honig proposed to grant DuPage's application on Section 307(b) grounds because of Elmhurst's greater need for a new transmission service. The Review Board affirmed Judge Honig's recommendation in a Decision, 19 FCC 2d 250,

[1] Both Elmhurst and Wheaton lie in DuPage County which is due west of Cook County (Chicago). Elmhurst is 4.5 miles and Wheaton is 13 miles from Chicago, and they are both part of the Chicago Urbanized Area.

released August 29, 1969. Previously, in a Memorandum Opinion and Order, 16 FCC 2d 899, released March 24, 1969, the Review Board had refused to grant a petition to reopen the record and enlarge the issues filed by Central. However, by a Memorandum Opinion and Order, 21 FCC 2d 395, released February 13, 1970, we vacated the Board's Decision and remanded this proceeding to Judge Honig for further hearings on three new issues.[2]

3. Central's request for a further hearing was founded upon the following circumstances: Frank Blotter, who is president, director, and 51% stockholder of DuPage, was also the president, director, and 26.7% stockholder of Canyon Broadcasters, Inc., licensee of daytime only standard broadcast Station WCKD, Ishpeming, Michigan. During the fall of 1967, Blotter requested authorization for WCKD to sign off one hour later than the time specified in its license, due to the impact of the Uniform Time Act on its service area. While Blotter's request was denied in January, 1968, Central alleged that WCKD, in fact, signed off late during the months from November, 1967, through January, 1968, and again during November and December, 1968. Since the repetition of the improper sign off practice suggested that it was willful or the result of extreme carelessness, a substantial question was raised as to whether Blotter should be entrusted with a second broadcast facility. However, our remand order noted that there was no basis for review of the Board's Section 307(b) determination and that there would be no relitigation of that question.

4. In a subsequent Memorandum Opinion and Order, 23 FCC 2d 22, released May 15, 1970, we denied DuPage's petition for reconsideration of our remand order, but we did clarify the scope of the new issues. In this regard, we said that the crucial question to be determined in the remand hearing was whether DuPage could be prospectively expected to exercise that degree of responsibility required of a licensee and that evidence relating to the steps proposed to be taken by DuPage to insure future compliance with our rules would be relevant to a resolution of this question. For this reason, we stated that DuPage would be allowed to introduce such evidence, as well as evidence showing that WCKD's violations were "purely accidental or unavoidable, or that other mitigating circumstances were present." We further held that, "if it appears from all the relevant facts and circumstances that DuPage can be expected to operate responsibly its proposed station, then DuPage's application may be granted." 23 FCC 2d at 26.

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[2] The issues are:

(a) To determine all of the facts and circumstances surrounding the operation of station WCKD at Ishpeming, Michigan, under the management of Frank Blotter, with particular respect to operation later than the hours specified in the station license and with excessive presunrise power during the months of November and December 1967, and January, November, and December 1968.

(b) To determine in the light of the facts developed under issue (a) whether DuPage County Broadcasting, Inc. of which Mr. Blotter is the principal stockholder, may reasonably be expected to exercise diligently that degree of licensee responsibility required of the operator of a broadcast facility and whether the public interest would be served by permitting Mr. Blotter to acquire an interest in an additional broadcast authorization.

(c) To determine in the light of the evidence adduced pursuant to the foregoing issues what disposition of this proceeding would best serve the public interest, convenience and necessity.

5. After the further hearing was completed, Judge Honig released a Supplemental Initial Decision, FCC 71D–62, on September 17, 1971, in which he concluded that DuPage's application should be denied. DuPage filed exceptions to the Supplemental Initial Decision,[3] and we heard oral argument, *en banc*, on September 7, 1972, Judge Honig's findings of fact are substantially correct, and, except as modified herein and by our rulings on exceptions which are attached as an Appendix, they are adopted. However, we do not agree with Judge Honig's conclusions, and accordingly, the reasoning set forth herein will be substituted for that of the Supplemental Initial Decision.

SUMMARY OF FACTS

6. Frank Blotter first began his career in broadcasting in 1932, and for most of the time since that year, he has been associated at one time or another with the ABC, CBS, or NBC Radio Networks as well as individual stations. During his years with the networks, Mr. Blotter played a part in the development, writing, production or direction of such programs as *Ma Perkins; Road of Life; Jack Armstrong; Public Enemy Number One; Fibber McGee and Molly; Beat the Band; Carnation Contented Hour;* and *Don McNeil's Breakfast Club.*

7. When Canyon acquired WCKD, then identified as WJAN, in 1965, it had been off the air for sometime, and the station required an almost complete technical reconstruction before service could be commenced by Canyon. To perform this reconstruction, Canyon hired Wesley J. Larson who had a diversified background as a reporter, salesman, miner, librarian, technical writer-librarian and electronic equipment repairman in the Army Signal Corps during World War II. He has a First Class Radiotelephone Operator's license and at one time owned a contract engineering business, which took care of transmitting and receiving equipment for such clients as Sawyer Air Force Base in Michigan. Larson also worked intermittently at WLUC–TV in Marquette as a transmitter engineer or shift engineer, and in addition he served as a part-time engineer on a contract basis at WJAN doing repair work on audio equipment. Subsequently, he worked for WJAN as an engineer and later as an announcer. When WJAN went off the air in early 1965, Larson went to work for Station WPJD, the only other broadcast facility in Ishpeming.

8. In the day-to-day operation of WCKD, Blotter concentrated upon programming, selling, maintaining community relations, personnel management and administration, which were his areas of expertise. It was difficult to make WCKD a viable operation for several reasons. First, Ishpeming has a population of less than 9,000 persons, and there was already an existing full time AM station when WCKD went on the air as a daytime only operation. Second, the prior financial failure of WJAN and its long absence from the air made it difficult to revive WCKD. This situation was further aggravated by the fact

[3] DuPage filed exceptions and a brief in support of its exceptions and request for oral argument on November 12, 1971, and an errata on November 18, 1971. The Broadcast Bureau filed a statement in support of the Supplemental Initial Decision on October 13, 1971, and a reply to DuPage's pleadings on November 26, 1971. Central filed a reply to DuPage's pleadings on December 23, 1971.

that Ishpeming did not have a strong economy, making it difficult to obtain sufficient advertising revenue to render the station profitable. For example, WCKD had a profit of approximately $2,000 in 1967, but it had a loss of approximately $5,000 in 1968.

9. For the technical operation of the station, Blotter, who is not an engineer,[4] relied very heavily upon Larson who was general manager, morning announcer and chief engineer. It was Larson's duty to instruct the part-time personnel, primarily high school and college students, in their duties, the technical aspects of which involved turning on the equipment, signing on the station, adjusting power output when presunrise operation was in effect, signing off and log keeping. As an announcer, Larson worked Monday through Friday from just prior to sign-on to 11:30 a.m. His routine in the early morning was to turn on the transmitter and reduce power from 5,000 watts to 500 watts during pre-sunrise operation, to broadcast from sign-on to 11:30 a.m., to take any measurements required by our rules, and to make corrections for any readings which were not in accord with specified figures. In addition, he received police reports and weather-caused emergency announcements such as school or road closings. Larson was generally at the station alone until approximately 9:00 a.m.

10. WCKD's license, issued in 1965, and the renewal thereof in 1967, specified daytime hours of operation in Central Standard Time (CST) from November, 1965, to April 27, 1969, although the customarily accepted time for Ishpeming had been Eastern Standard Time (EST) since 1946. During this period, in order to conform to the locally accepted time, WCKD converted its license time, expressed as Central Standard Time, to Eastern Standard Time by adding an hour to the times specified in the license. When the Uniform Time Act became effective in April, 1967, it had no immediate impact on WCKD's operation, since the Central Daylight Time specified by the Uniform Time Act for Michigan's Upper Peninsula was the same as the locally accepted Eastern Standard Time.

11. However, with the approach of the change from Daylight to Standard Time in October, 1967, controversy arose in the Upper Peninsula whether the new Central Standard or the existing Eastern Standard Time should be observed. Various governmental agencies and local enterprises decided to adopt differing policies. Thus, WCKD had to decide whether to follow its prior custom of using Eastern Standard Time or to observe Central Standard Time. Because certain local sign off times were considered to have become customary in Ishpeming, Blotter, without being aware of whether the station was observing Central or Eastern Standard Time, decided to continue using the previous sign off times as a service to the area.

12. Therefore, on October 18, 1967, when Blotter was in Washington, D.C., for a hearing in the earlier phase of this proceeding, he talked with several staff members of our Broadcast Bureau concerning a possible waiver of WCKD's licensed sign off time. Blotter testified that from these conversations he got the impression that obtaining the

[4] While he does have a third-class endorsed license, Blotter possesses no particular engineering background or training.

waiver was a simple matter of filing a letter requesting such a waiver and that he could commence signing off one hour late without waiting for the request to be granted. Because of this understanding, Blotter did not consult with counsel regarding his request and on October 25, 1967, he wrote a letter to the Broadcast Bureau, seeking a "one hour waiver attachment" for WCKD's license without specifying whether the waiver request was for sign on or sign off times. Subsequently, Blotter received a telegram from the Chief of the Broadcast Bureau denying WCKD a one hour sign on waiver. Blotter wrote the Bureau again on November 2, 1967, pointing out that WCKD was in fact seeking a sign off waiver.

13. By a letter dated January 19, 1968, from the Chief of the Broadcast Facilities Division of the Broadcast Bureau, Blotter was informed that his waiver request could not be granted because of the provisions of Sections 1.542(e) and 73.87 of our Rules. Blotter received the letter in Ishpeming on or about January 26, 1968, and promptly took steps to comply with the terms of WCKD's license by informing the staff that license time as expressed in Central Standard Time would be followed. However, it appears that his instructions were misunderstood, and the station signed off at the time specified for February, or 45 minutes late, during the last five days of January. In addition, during the period from October 30, 1967, to January 25, 1968, due to Blotter's mistaken conception of the effect of his waiver request, WCKD generally signed off one hour late.

14. From February 1, 1968, through April 29, 1968, WCKD signed off on time. With the advent of Daylight Savings Time on April 28, 1968, however, WCKD began to sign off early. This practice continued until October 27, 1968, when, with the return to Central Standard Time, WCKD generally signed off one hour late for the remainder of 1968.[5] According to Blotter the late sign offs resumed in November, 1968, because the program logs for that month were prepared using sign on and off times from the program logs used in November, 1967. The secretary who prepared the logs was unaware of the fact that WCKD had signed off improperly in 1967 and thus repeated the error of the past year by inserting incorrect sign off times in the current program logs.

15. On November 25, 1969, we issued a Notice of Apparent Liability, FCC 69–1301, against WCKD, which recited the facts concerning the late sign offs during the months of November and December, 1967, and January, November, and December, 1968. After considering all of the circumstances, we concluded that the station should be assessed a forfeiture of $1,000 for the violations occurring within one year preceding the issuance of the Notice of Apparent Liability. The forfeiture was paid by WCKD on December 12, 1969, and this matter has not been given any further consideration in conjunction with the operation of Station WCKD since that time.

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[5] Central claims that Blotter was the operator on duty when the late sign off occurred on December 17, 1968. However, it appears that a typographical error was made in the parties' stipulation 4, upon which Central relies, and that Blotter was in fact the operator on duty only on December 17, 1967

16. There is no evidence that Blotter or anyone else at WCKD made a conscious decision to sign off late in November and December, 1968. Blotter was unaware that the station was signing off late during this period until he was advised of the contents of Central's petition raising this matter by his counsel, on December 31, 1968, at which time Blotter promptly took action to correct the situation. There is no allegation of any late sign off since that date. Due to the controversy generated in the Upper Peninsula by the passage of the Uniform Time Act, several petitions were filed with the Department of Transportation seeking to have the Upper Peninsula placed in the Eastern Time Zone. On April 27, 1969, the Upper Peninsula having been officially moved into the Eastern Time Zone, WCKD's license was changed to specify Eastern Standard Time in accordance with that action.

17. WCKD did not benefit economically from the late sign offs. During the times when WCKD remained on the air longer than authorized, there were relatively few commercial announcements, and these few could easily have been scheduled during the licensed hours of WCKD's operation. For the five complete months that WCKD operated overtime, the station averaged slightly more than six commercial minutes per hour during license hours and slightly less than six commercial minutes per hour during the excess hour. Blotter testified that advertisers on WCKD very rarely expressed a preference for spot announcements to be placed at any particluar time but when they did express a preference, it was usually for a time during Larson's morning show. Blotter further stated that he could not recall any advertiser requesting that a spot announcement be carried in the late afternoon.

18. In addition to these facts, the record also establishes that the station was guilty of other infractions of our Rules and the terms of its license. Thus, on different occasions during the years 1967 and 1968, WCKD engaged in premature presunrise operation, used presunrise power after sunrise, omitted "carrier on" entries, employed daytime power before sunrise, and operated with excessive power. On May 7, 1968, Station WCKD was inspected by a Commission engineer. Subsequently, an Official Notice of Violation was issued on May 21, 1968, listing a number of apparent violations. Blotter responded to that Notice on June 4, 1968, and submitted the station's operating logs for a period involving the months of March, April, and May, 1968, pursuant to the Commission's request.

19. By letter of December 19, 1969, WCKD's logs were returned to the station. With the exception of a reference to operation with full power prior to the time specified in WCKD's license in the Notice of Apparent Liability discussed in paragraph 15, *supra*, no further action was taken against the station in connection with these matters. On June 30, 1971, we granted a renewal of the license under which WCKD had been operating since October 1, 1967, and authorized the assignment of the license to Taconite Broadcasting Corporation, without any further consideration of the foregoing matters. See FCC 71–683, released July 7, 1971.

20. DuPage submitted its proposal for the manner in which it intends to operate its new station as an exhibit in the remand proceeding.

Attached to this exhibit are the biographies of Frank Blotter and his sister, Lois Blotter, the two principals of DuPage, and of Glenn E. Webster, the intended full time Technical Director-Chief Engineer. Frank Blotter will serve as general manager with general supervisory responsibility over the programming, sales and engineering departments. Lois Blotter will fill the position of office manager and have supervisory responsibility for matters concerning finances, mail, state and federal reports, personnel and community relations. Miss Blotter has had broad experience in business administration as she has been a wage earner since 1928, and an employee of the Peoples Gas Light and Coke Company of Chicago for 40 years. Since 1952, she has been Secretary to the Chairman of the Peoples Gas System and Office Manager of the Chairman's Division. In her various capacities with the Peoples Gas Light and Coke Company, Miss Blotter has had extensive dealings with state and federal regulatory agencies.

21. Mr. Webster has held a First Class Radiotelephone license for over 40 years, has a B.S. degree in electrical engineering, and has been a consulting engineer in the communications field since 1929 when he supervised the construction of pioneer radio stations. Since 1962, he has been the president and owner of Webster Engineering Company, which is engaged in consulting engineering and management services for many branches of the communications industry throughout the Midwest. His organization designs, develops, and in some cases, actually installs the complete station or system (radio, television, CATV, etc.) on a turn-key basis. Webster will be responsible for the performance of specific written duties concerning all aspects of the day-to-day technical operation of the station. In light of the fact that WCKD has been transferred to a group with which Blotter has no connection, he has no enterprise that will detract from the time he can spend at the Elmhurst operation should DuPage's application be granted, and Blotter has stated that he will devote full time to the management of the proposed Elmhurst station.

CONCLUSIONS

22. As we noted initially, this proceeding was remanded, in light of the possibility that WCKD's sign off practices were willful or the result of extreme carelessness, for a further hearing to determine whether DuPage should be entrusted with this new broadcast facility. At the same time, we made it clear that DuPage's application would be granted if the record established that DuPage could be expected to operate its proposed station responsibly. Thus, the question here is simply whether there is sufficient evidence to demonstrate that DuPage will be able to operate this proposed station in a proper manner.

23. After considering the entire record, we are convinced that the late sign offs at Station WCKD did not result from an intentional disregard for our regulations. Rather, it appears that the first series of late sign offs, when WCKD continued to use the customary sign off times as a service to its listening area, occurred because of Blotter's misunderstanding of the effect of his request for waiver of the sign off requirements expressed in WCKD's license. As to the second series

of late sign offs which commenced with the change from Daylight to Standard Time in the fall of 1968, Blotter testified that the late sign offs occurred because of a secretary's error in copying the times used on the logs for the previous year. When Blotter's unimpeached testimony that he was not aware of this practice until it was brought to his attention as a result of Central's pleading is considered in light of the continuing controversy in WCKD's service area about the time change, it appears that a reasonable explanation has been provided for this unfortunate series of events.[6]

24. Turning to the circumstances surrounding the remaining deficiencies in the operation of Station WCKD, it should be noted first that this was Blotter's initial experience as a principal of a broadcast facility. The record also shows that most of the rule infractions occurred prior to the inspection of the station on May 7, 1968, and that they were often the result of problems associated with the resumption of service by a silent station in a small market, using inexperienced, part-time personnel. More importantly, however, although the record was not closed in this proceeding until March 19, 1971, there is, with but one minor exception,[7] no evidence of any violation of our requirements after January 1, 1969. In spite of being subject to close scrutiny by both Commission personnel and Central, it appears that Station WCKD's operation during a period of time in excess of two years involved no significant transgression and that Blotter has thus learned a lesson from the shortcomings which had been pointed out in his earlier activities.

25. With respect to its present application, DuPage has set forth a comprehensive and detailed plan for the technical operation of its proposed Elmhurst station, which will be more sophisticated than anything ever proposed for Station WCKD. DuPage's unimpeached written proposal details how responsibilities will be delegated among the officers and employees. Each of the three principal staff members—Frank Blotter, Lois Blotter and Glenn Webster—will work in the areas in which their expertise is the greatest. Frank Blotter will be the general manager, primarily concerned with programming. His experience throughout his broadcast career has prepared him well for this position. Moreover, since Blotter has transferred his entire interest in Station WCKD to a new group, he has no enterprise which would detract from the time he could devote to DuPage's proposed station, and Blotter has stated that he will, in fact, devote his full time to the management of the new facility.

26. Lois Blotter, who will serve in a general administrative capacity, has spent almost 40 years with a regulated public utility. Although this will be her first endeavor in broadcasting, her background in dealing with regulatory agencies and her knowledge of ad-

[6] Although Central argues that *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951), requires a different conclusion, this proceeding includes no misrepresentation or candor issues, and Judge Honig's Supplemental Initial Decision contains no affirmative findings as to the credibility of the witnesses. Since the record before us contains substantial evidence supporting the explanation set forth above, we find no basis for the adverse decision urged by Central.

[7] It appears that there was a use of excess power during presunrise operation in February, 1970, while an inexperienced operator, who had worked for the station for only a short period of time, was on duty.

ministrative procedures provide her with a broad foundation upon which to perform her duties. Glenn Webster, who will be chief engineer for DuPage, has over forty years of service in the communications industry and has owned and operated the largest communications consulting and sales business in the Midwest for almost ten years. Webster's experience in this business, involving the design, development, and installation of various broadcast facilities, provides ample evidence of his ability to execute the specific written duties concerning the day-to-day technical operation of the station which have been assigned to him.

27. In view of the circumstances set forth above, we are convinced that this record contains sufficient evidence to demonstrate that DuPage will be able to operate its proposed station in a proper manner. As we noted above, the sole purpose of this remand proceeding was to make a prospective determination of whether DuPage can be expected to operate its proposed station responsibly. In this connection, we believe that critical weight must be given to the facts that Station WCKD's late sign offs were not the result of an intentional disregard for our regulations and that the license of Station WCKD was subsequently renewed with a public interest finding that the licensee was qualified in all respects.

28. Most importantly, however, this record is devoid of any evidence of significant shortcomings in the operation of Station WCKD after January 1, 1969. Since the circumstances surrounding the operation of Station WCKD during this latter period are most nearly comparable to those which would exist for DuPage's proposed station, Blotter's two and one-half years of unblemished operation are a substantial demonstration that he will be able to manage the proposed broadcast facility responsibly. When this favorable showing is also considered in light of DuPage's detailed and comprehensive plan for the operation of its new broadcast facility, we are convinced that there is no impediment to DuPage and Blotter being licensees of this Commission. Finally, as we previously stated that there would be no relitigation of the Review Board's Section 307(b) determination that DuPage would serve "a more pressing need for a local outlet of self-expression," 19 FCC 2d 250, at 257, we shall adopt the Board's Decision as our own and grant DuPage's application.

29. Accordingly, IT IS ORDERED:

(a) That the Decision, FCC 69R–349, 19 FCC 2d 250, adopted by the Review Board on August 15, 1969, IS ADOPTED as our own;

(b) That the application of DuPage County Broadcasting, Inc. (File No. BP–16292) for a new Class II standard broadcast station to operate on 1530 kHz, daytime only, with a power of 250 watts, utilizing a directional antenna system, IS GRANTED; and

(c) That the application of Howard L. Enstrom and Stanley G. Enstrom, d/b/a Central DuPage County Broadcasting Company (File No. BP–16465), for a new Class II standard broadcast station at Wheaton, Illinois, to operate on 1530 kHz, daytime only, with a power of 500 watts, utilizing a directional antenna system, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Rulings on Exceptions to Supplemental Initial Decision, Exceptions of DuPage County Broadcasting, Inc.

Exception No.	*Ruling*
1	*Granted* to the extent indicated in paragraph 6 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
2	*Granted;* see paragraph 7 of the Decision.
3	*Granted* to the extent indicated in paragraphs 7 and 9 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
4, 5, 12, 13, 19, 21	*Denied* as being of no decisional significance.
6, 7, 31	*Granted* to the extent indicated in paragraphs 10 and 11 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
8	*Granted* to the extent indicated in paragraph 9 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
9, 10, 11, 14, 15, 16, 18, 20, 22, 24, 25, 27, 29, 34, 36, 37.	*Denied;* Judge Honig's findings adequately and correctly reflect the record.
17, 23	*Granted;* the requested findings accurately reflect the facts of record in this proceeding.
26	*Granted* to the extent indicated in footnote 5 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
28, 30, 33	*Granted* to the extent indicated in paragraphs 12 and 13 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
32	*Granted* to the extent indicated in paragraphs 14, 16, and 17 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
35	*Granted* to the extent indicated in paragraphs 15, 18, and 19 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
38	*Granted* to the extent indicated in paragraph 20 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
39	*Granted* to the extent indicated in paragraph 21 of the Decision; *Denied* in all other respects since Judge Honig's findings adequately and correctly reflect the record.
40–57	*Granted* to the extent that the conclusions of the Decision have been substituted for those of the Supplemental Initial Decision.

F.C.C. 71D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DUPAGE COUNTY BROADCASTING, INC., ELMHURST, ILL.	Docket No. 16965 File No. BP-16292
HOWARD L. ENSTROM AND STANLEY G. ENSTROM D.B.A. CENTRAL DUPAGE COUNTY BROADCASTING CO., WHEATON, ILL.	Docket No. 16966 File No. BP-16465
For Construction Permit	

APPEARANCES

Morton L. Berfield, Esq., on behalf of DuPage County Broadcasting, Inc.; *Robert W. Coll, Esq.*, on behalf of Central DuPage County Broadcasting Company; *Michael W. Faber, Esq.*, and *Philip V. Permut, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG [1]

(Issued September 13, 1971; Released September 17, 1971)

PRELIMINARY STATEMENT

1. The application of DuPage County Broadcasting, Inc. ("DuPage"), requests authorization to construct and operate a new Class II standard broadcast station on 1530 kHz at Elmhurst, Illinois. Central DuPage County Broadcasting Company ("Central"), seeks authorization for a similar broadcast facility on 1530 kHz at Wheaton, Illinois. Each applicant proposes a daytime only operation utilizing a directional antenna system, DuPage with a power of 250 watts and Central with a power of 500 watts.

2. The Commission, while finding both applicants qualified to construct, own and operate the proposed facilities, designated their mutually exclusive applications for hearing in a consolidated proceeding upon Section 307(b) [2] and contingent standard comparative issues (5 FCC 2d 557). After an evidential hearing, this Hearing Examiner issued an Initial Decision on July 23, 1968 (19 FCC 2d 259), granting the DuPage application upon the basis of Section 307(b) preferential considerations and denying the Central application. Thereafter, a

[1] This supplemental decision deals with a remand hearing on issues specified with respect to the application of DuPage County Broadcasting, Inc. for an Elmhurst, Illinois station which had been recommended for grant in an Initial Decision released in July, 1968.

[2] The Section 307(b) issue requires a determination, "in light of Section 307(b) of the Communications Act, which of the proposals would better provide a fair, efficient and equitable distribution of radio service".

petition to reopen the record and enlarge the issues with respect to the DuPage application, filed by Central, was denied by the Review Board by Order released March 24, 1969, 16 FCC 2d 899. Upon consideration of exceptions to the Initial Decision filed by both applicants, the Review Board by decision released August 29, 1969, 19 FCC 2d 250, determined the Section 307(b) issue in favor of the Elmhurst station proposal, granted DuPage's application, and denied Central's Wheaton application.

3. By Memorandum Opinion and Order released February 13, 1970 (FCC 70–159, 21 FCC 2d 395), the Commission, acting upon Central's application for review of the above two Review Board decisions, reopened the record and remanded the proceeding to the Hearing Examiner for further hearing on the following issues:

(a) To determine all of the facts and circumstances surrounding the operation of station WCKD at Ishpeming, Michigan, under the management of Frank Blotter, with particular respect to operation later than the hours specified in the station license and with excessive presunrise power during the months of November and December 1967, and January, November and December, 1968.

(b) To determine in the light of the facts developed under issue (a) whether DuPage County Broadcasting, Inc. of which Mr. Blotter is the principal stockholder, may reasonably be expected to exercise diligently that degree of licensee responsibility required of the operator of a broadcast facility and whether the public interest would be served by permitting Mr. Blotter to acquire an interest in an additional broadcast authorization.

(c) To determine in the light of the evidence adduced pursuant to the foregoing issues what disposition of this proceeding would best serve the public interest, convenience and necessity.

With respect to the further proceedings on the above issues, the Commission stated:

"13. Evidence introduced at the reopened hearing should be restricted to that which is pertinent and relevant to the resolution of the issues designated herein. We contemplate no relitigation of the issues previously designated (such as the Section 307(b) issue) and no changes in the determinations made except as they may be required by the evidence adduced at the reopened hearing under the issues specified herein. The Initial Decision of the Hearing Examiner, therefore, should be confined to a discussion of such evidence and to the changes in the findings, conclusions, and ultimate determinations which are necessitated by reason of the new facts developed at the reopened hearing.

"14. We realize, of course, that Elmhurst has been found to have a greater need for a first standard broadcast facility and that DuPage is the only applicant proposing to locate there. Nevertheless, should it be found that DuPage cannot be expected to exercise that degree of licensee responsibility necessary to justify a grant, we believe that the overall public interest would be better served by an award to Central or by the denial of both applications."

4. By a further Memorandum Opinion and Order, FCC 70–492, released May 15, 1970, the Commission ruled on a petition for reconsideration of its remand action filed by DuPage and granted that petition to the extent of clarifying issue (b) above. The Commission held that DuPage should be allowed to introduce evidence concerning

the steps proposed to be taken by DuPage to insure future compliance with Commission rules as well as evidence showing that the violations in the operation of WCKD were purely accidental or unavoidable, or that other mitigating circumstances were present. The Commission further stated:

> If it appears from all the relevant facts and circumstances that DuPage can be expected to operate responsibly its proposed station, then DuPage's application may be granted.

5. Upon motion filed by DuPage on March 10, 1970, the hearing after remand had been stayed by the Commission by Memorandum Opinion and Order (FCC 70–354, released April 2, 1970). After the Commission's ruling on the DuPage reconsideration petition on May 15, 1970, a hearing conference was held on May 21, 1970.[3] The remand hearing was held on October 6 through October 9, October 14, and December 8 and 9, 1970. The record was left open for the submission of some additional evidence by DuPage which had been requested by the Broadcast Bureau. The further exhibits of DuPage were received by an order of the Examiner released February 18, 1971, which also closed the record (FCC 71M–259). Upon motion of the Broadcast Bureau, the record was reopened for receipt of revised Stipulation No. 3 by an order of the Examiner (FCC 71M–429), released March 19, 1971, which again closed the record.

6. Proposed findings of fact and conclusions were filed by each of the parties on April 28, 1971. Errata relative to the Bureau's pleadings was filed on April 29, 1971. Replies were filed by DuPage and Central on May 28, 1971.

FINDINGS OF FACTS

7. Canyon Broadcasters, Inc. (hereinafter Canyon), was at all times pertinent hereto the license of standard broadcast Station WCKD, Ishpeming, Michigan. Mr. Frank Blotter was president, director and 26.7% stockholder of Canyon.[4] He is the president, a director and 51% stockholder of DuPage County Broadcasting, Inc. Blotter became active in the purchase and resumption of broadcasting of standard broadcast Station WJAN (later WCKD), Ishpeming, Michigan, in 1965 (DuPage Ex. 14, p. 19). Before that, Blotter had been employed with several advertising agencies, as well as NBC (1935–1942), and CBS (1942–1945). In 1958 Blotter established his own consulting firm.

8. Station WCKD (then WJAN), was obtained by Canyon through an assignment early in 1965. Wesley J. Larson, who had worked as a part-time engineer on a contract basis for the WJAN owners, performed the principal technical work in restoring the station to service for Canyon. When the facility returned to the air in August 1965,

[3] A hearing conference had also been held on March 3, 1970, following remand of the case for further hearing.

[4] WCKD was acquired by Canyon and resumed operation August 30, 1965. An assignment application (BAL–6962) to assign the WCKD license to Taconite Broadcasting, Inc. (Tr. 895) was granted by the Commission on June 30, 1971, following renewal of Canyon's license.

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Larson, a first-class FCC licensed engineer,[4a] served as its General Manager, Chief Engineer and morning announcer. In addition to Blotter, who as President of Canyon supervised the operation of the station, and Larson, there were three other full-time employees at WCKD: William Argall, a combination announcer-operator with a third class license with broadcast endorsement, who worked the afternoon shift; a secretary-receptionist; and a full-time salesman. WCKD used area high school and college students on a part-time basis to work as announcer-operators on Saturday and Sunday shifts, and to fill in during the week when necessitated by vacation or illness of Larson or Argall. The individuals who served in this part-time capacity during 1967–68 were John Temple, J. Jennings, Steven Pence, John Reidy (who was not a student), and Robin U'Ren. All the part-time broadcast employees had third-class FCC licenses with broadcast endorsements, except for Pence who acquired a special FCC Temporary Operator's Permit before joining WCKD. He later received a third-class license. Blotter verified that each of the part-time employees was licensed by the Commission. Larson instructed them in their duties, which from a technical standpoint involved turning on the equipment, signing on the station, adjusting power output when pre-sunrise operation was in effect, signing-off, and log-keeping. Larson had confidence in his part-time operators.

9. Keeping WCKD a viable operation was difficult for a number of reasons. First, the population of Ishpeming is under 9,000 persons and there is another station in Ishpeming, WJPD, which is a full-time station whereas WCKD was a daytime only operation. Moreover, the prior financial failure of WJAN and its long absence from the air added to the problem of establishing the station as a viable operation. Ishpeming did not have a strong economy and it was difficult to obtain adequate advertising revenue. Thus, during 1967, WCKD had $35,210 in total broadcast revenues as against $33,123 in actual out-of-pocket expenses. In 1968, WCKD had broadcast revenues of $34,454, as against $39,314 in expenses.

10. Mr. Blotter worked hard to keep the station solvent. He concentrated upon programming, selling, maintaining community relations and the management of personnel and the administrative aspects of the station. He is not an engineer in that he had only a third-class endorsed license and possesses no particular engineering background or training. For the technical operation of the station he relied very heavily upon Larson, the Chief Engineer.

11. Ishpeming is located in a remote, rather sparsely populated area near Lake Superior, where the weather conditions are extreme. The winter begins early in the Fall and continues into late Spring. Heavy snowfalls are frequent, the total yearly snowfall averaging between 150–200 inches. Temperatures often drop many degrees below zero for extended periods of time. The combination of all these adverse weather conditions makes the station a much relied upon service. For example, WCKD provided weather, road, school and postal an-

[4a] WCKD was not required to have a full-time, first class engineer, but in order to better comply with Commission regulations, Blotter decided to have a first-class engineer available (Tr. 762–63).

nouncements vital to the daily activities of the residents of the area, particularly in the outlying areas. Weather emergencies of this nature are regular occurrences, and WCKD responded by making available as much time as needed to accommodate all public service and weather emergency announcements.

12. Canyon was authorized to operate WCKD as a Class III station, daytime only, on 970 kHz with a power of 5 kilowatts, utilizing a non-directional antenna (DuPage Ex. 13, p. 14). Canyon's license, issued November 2, 1965 (File No. BZ–5793), and renewal of license, issued September 11, 1967 (File No. BR–3786), specified daytime hours of operation in Central standard time[5] from November 2, 1965 to April 27, 1969, beginning at sunrise and ending at sunset for each month as follows (Stipulation 1, DuPage Ex. 13, pp. 1, 14; Ex. 13b):

January	7:30 a.m. to 4:30 p.m.	July	4:15 a.m. to 7:45 p.m.
February	7:00 a.m. to 5:15 p.m.	August	4:45 a.m. to 7:00 p.m.
March	6:00 a.m. to 6:00 p.m.	September	5:30 a.m. to 6:00 p.m.
April	5:00 a.m. to 6:30 p.m.	October	6:00 a.m. to 5:00 p.m.
May	4:15 a.m. to 7:15 p.m.	November	6:45 a.m. to 4:15 p.m.
June	4:00 a.m. to 7:45 p.m.	December	7:30 a.m. to 4:00 p.m.

On April 27, 1969, the license of Canyon was modified (File No. BS–3786), to change the hours of operation from Central standard time to Eastern standard time as follows (DuPage Ex. 13, p. 33):

January	8:30 a.m. to 5:30 p.m.	July	5:15 a.m. to 8:45 p.m.
February	8:00 a.m. to 6:15 p.m.	August	5:45 a.m. to 8:00 p.m.
March	7:00 a.m. to 7:00 p.m.	September	6:30 a.m. to 7:30 p.m.
April	6:00 a.m. to 7:30 p.m.	October	7:00 a.m. to 6:00 p.m.
May	5:15 a.m. to 8:15 p.m.	November	7:45 a.m. to 5:15 p.m.
June	5:00 a.m. to 8:45 p.m.	December	8:30 a.m. to 5:00 p.m.

The license of Canyon specified an antenna current value of 13.25 amperes and antenna resistance of 28.5 ohms (DuPage Ex. 13, p. 14; Stipulation 1).

13. Officially, the Upper Peninsula of Michigan had been in the Central Zone since 1918. In 1936, the Interstate Commerce Commission placed the Lower Peninsula of Michigan in the Eastern Zone (see DuPage Ex. 13A). In early 1969 the Department of Transportation received several petitions to amend Title 49, Sec. 71.4(a) of the Code of Federal Regulations to include the Upper Peninsula of Michigan within the Eastern standard time zone. The petitioners alleged, *inter alia*, that a large part of the Upper Peninsula informally indicated a preference for Eastern time and were already informally observing it (see DuPage Ex. 13A). In 1966, the Uniform Time Act required observance of advanced time within all established time zones from the last Sunday in April to the last Sunday in October (see DuPage Ex. 13A, p. 2). This new Federal law first went into effect in April, 1967 (DuPage Ex. 13, p. 2). On April 27, 1969, the Upper Peninsula was placed in the Eastern time zone (DuPage Ex. 13, Attachment 7), and, as noted supra, WCKD's license was modified to conform to this change.

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[5] Marquette County, in which Ishpeming is located, and a large part of the Michigan Upper Peninsula, had been observing Eastern Standard Time since April 1946 (DuPage Ex. 13, p. 18), although under a 1918 order of the Interstate Commerce Commission defining time zones, the Upper Peninsula always remained in the Central Time Zone (DuPage Ex. 13–A).

PREMATURE PRESUNRISE OPERATION OF WCKD

14. By telegram dated October 30, 1967, Canyon was given authority by the Commission to operate Station WCKD between 6 AM and sunrise specified in its basic instrument of authorization pursuant to Section 73.99 of the Rules.[6] The authorization called for use of WCKD's daytime antenna and operating power of 500 watts determined by the direct method utilizing the last antenna resistance measurement submitted to the Commission (DuPage Ex. 13, pp. 1, 39, 40). The license of Canyon then in effect discloses that pre-sunrise authority was required to permit Station WCKD to operate from 6 AM until sunrise Central standard time in November and December, 1967, and January and February 1968. After the change in Section 73.99 of the Rules became effective,[7] pre-sunrise authority was required to operate the station with pre-sunrise power from 6 AM local time to sunrise specified in Canyon's license commencing September 1, 1968 (DuPage Ex. 13, pp. 14, 35). Entries in WCKD's operating logs were kept in Central daylight (saving) time in October 1967 until the last Sunday of the month, in Central Standard time from the last Sunday in October 1967 to the last Sunday in April 1968, Central daylight time from the last Sunday in April to the last Sunday in October 1968, and Central Standard time from the last Sunday in October to the end of 1968 (Stipulation 3). According to WCKD's operating logs, the station *began pre-sunrise operation prematurely* as follows: In 1967, 4 to 5 minutes on 2 days in October, 2 to 5 minutes on 21 days in November, and 2 to 30 minutes on 20 days in December, and in 1968, 2 to 5 minutes on 22 days in January, 1 to 5 minutes on 24 days in February, 2 to 10 minutes on 9 days in March, 2 to 4 minutes on 7 days in September, 1 to 17 minutes on 26 days in October, 1 to 30 minutes on 26 days in November, and 2 to 17 minutes on 23 days in December.

15. Premature pre-sunrise operation of WCKD between October 30, 1967 and December 30, 1968, of 5 minutes or more duration occurred 65 times out of 180 total instances of prematurity (see, table titled "Premature Pre-Sunrise Operation" on page 8 of Bureau's Proposed Findings of Fact showing the extent of pre-sunrise operation for each specific date involved). Such operation for periods in excess of 5 minutes occurred 13 times in the same period of 14 months.[8] (Stipulation 3.)

Omission of "Carrier On" Entries

16. A blank space near the lower left hand corner of WCKD's operating logs is provided for an entry concerning "carrier on." The half hour log entries begin near the top of WCKD's operating logs in spaces provided for them. According to WCKD's chief radio operator, Mr. Wesley J. Larson, the entry for "carrier on" signifies the time when

[6] Mr. Blotter did not understand the meaning of "basic instrument of authorization" even after discussion of the matter with his chief radio operator. He did not attempt to find out from anyone else (Tr. 786–788).

[7] Effective September 1, 1968, Section 73.99 of the Rules concerning pre-sunrise operation was amended to specify "6 a.m. local time" instead of "6 a.m. local standard time" (14 FCC 2d 393).

[8] The first log entry for December 1 and for December 4, 1967, was 5:30 AM, an impossibility in light of the "carrier on" entry at 5:50 AM.

energy is supplied to the antenna and the first program log entry the time when modulation of the carrier commences (DuPage Ex. 13F; Tr. 977, 978, 1092–1093, 1096). The amount of time representing premature pre-sunrise operation as noted above is the difference in time between the log entry under "carrier on" or from the first half hour log entry if no entry is indicated under "carrier on" and 6 AM local standard time specified in WCKD's license through August 1968 and 6 AM local time thereafter (Stipulation 3). The record (Stipulation 3) shows that entries for "carrier on" were not made on the following days: [9]

1967

October 7, 14, 21, 28.
November 4, 11, 12, 17, 18, 19, 25.
December 2, 9, 16, 17, 21, 22, 23, 24, 25, 26.

1968

January 1, 6, 8, 10, 13, 19, 20, 23, 24, 25, 27, 28.
February 1, 8, 10, 11, 12, 17, 18, 24, 25.
March 2, 3, 8, 11, 16, 21, 23, 25, 28, 30.
April 6, 8, 13, 20, 21, 27, 29, 30.
May 11, 14.
July 6, 7, 10, 11, 12, 14, 21, 28.
August 24.
September 16, 17.
October 1, 12.
November 18, 25, 27.
December 28, 29.

Thus, between October 7, 1967 and December 29, 1968, there were 80 instances of failure to log "carrier on" entries.

Operation With Presunrise Power After Sunrise [10]

17. WCKD was operated with pre-sunrise power instead of normal daytime power after sunrise for 28 minutes on 1 day in October, for 5 minutes on 1 day in November, from time of observation to possibly as much as 30 minutes on 4 days in December, 1967; from 3 to 13 minutes on 4 days in January, from time of observation to possibly as much as 30 minutes on 2 days in January, from 15 minutes to 4 hours and 35 minutes on 11 days in February, from time of observation to possibly as much as 30 minutes on 2 days in February, from 20 to 24 minutes on 5 days in March, from time of observation to possibly as much as 30 minutes on 1 day in March, from 28 to 55 minutes on 1 day in September, from 17 to 25 minutes on 4 days in October, for 25 minutes on 1 day in November, and from 10 to 45 minutes on 13 days in November 1968. The amount of time in minutes for each day is set forth in the detailed tabulation [11] based on Stipulation 3, which appears on page 11 of the Bureau's proposed findings of fact. Between

[9] These omissions were in violation of Section 73.113(a)(1) of the Rules which requires that log entries be made for the time when the station began to supply power to the antenna.

[10] Section 73.87 of the Rules provide that no standard broadcast station shall operate with powers other than those specified in its license.

[11] In those instances where WCKD's operating log entries did not indicate when power was changed from pre-sunrise mode to daytime operation, the period when WCKD operated with pre-sunrise power instead of daytime power can be estimated from the last pre-sunrise and first daytime log entries (Stipulation 3).

October 1967 and November 1968, there were at least 49 instances of operation with pre-sunrise power after sunrise.

Operation With Daytime Power Before Sunrise

18. The operating logs of WCKD disclose that the station began normal daytime operation with 5 kilowatts power before sunrise time specified in its license as follows: 12 minutes to 1 hour and 5 minutes on 28 days in October, 4 to 48 minutes on 12 days in November, and 5 to 60 minutes on 23 days in December 1967; 5 to 42 minutes on 17 days in January, 5 to 30 minutes on 10 days in February, 5 to 7 minutes on 8 days in March, 5 minutes on 6 days in August, 15 to 50 minutes on 18 days in September, 5 minutes to 1 hour and 17 minutes on 10 days in October, 5 minutes to 1 hour and 2 minutes on 4 days in November, and 5 minutes to 1 hour and 33 minutes on 18 days in December 1968. The amount of time in minutes involved in premature daytime operation on various days of the months indicated above is set forth in a table, based on Stipulation 3, appearing on page 13 of the Bureau's proposed findings of fact. Between October 1, 1967 and December 30, 1968, WCKD began normal premature daytime operation on 159 days.

USE OF U.S. NAVAL OBSERVATORY TIME

19. By telegram of October 30, 1967, WCKD was granted a Pre-sunrise Service Authority allowing it to operate with a power of 500 watts "between 6:00 AM and sunrise times specified in basic instrument of authorization. . . ." (DuPage Ex. 13, p. 39). However, Larson, the station's chief engineer, thought that the switch in power from 500 watts to 5,000 watts was to be made at the times for "local sunrise", as specified in Central Standard time in a publication issued by the U.S. Naval Observatory for Marquette, Michigan;[12] Tr. 1019–1022; DuPage Ex. 12, p. 34. Marquette is located some 16 miles from Ishpeming (Tr. 576).

20. WCKD's chief engineer testified that he tried to adhere as closely as possible to the sunrise times set forth in the Naval Observatory publication and also instructed other radio operators at WCKD to do the same (Tr. 1022, 1023). Because of the numerous days WCKD failed to log its time of power change, it was not possible to determine on 158 days whether this policy was followed (Central Ex. F). Of the 82 times between October 28, 1967 and December 31, 1968, when the power change event was logged, reference to Naval Observatory time reflected that seven were on time, seven were within one minute, six were within two minutes, ten were within three minutes, five were within four minutes, and one was within five minutes. Thus, a total of 36 of the recorded power changes were within five minutes or less, representing 44% of the operating log entries. The remaining 46 power changes were made within six minutes to as much as one hour and

[12] Mr. Blotter explained that the use of the U.S. Naval Observatory time chart (DuPage Ex. 13, p. 34) "was based upon our reading of the Commission's public notice (Mimeo. No. 2569) of June 30, 1967, Attachment 10 to DuPage Ex. 13, where it refers to 'operation from 6:00 AM to local sunrise.' It should also be noted that the PSA authorization, Attachment 11 to DuPage Ex. 13, was a new factor when it became effective in October, 1967." (DuPage Ex. 13, p. 7).

nine minutes from the time shown by the Naval Observatory for sunrise, representing 56% of the operating log entries for power changes.[13]

Operation With Excessive Presunrise Power

21. WCKD's operating logs from October 1967 through December 1968 disclose that entries under antenna current indicate that the station operated overpower in excess of five percent above authorized pre-sunrise power (500 watts) a total of 9 times in November and December of 1967, and a total of 18 times in January, February, March, November and December of 1968.[14] Operation of WCKD with excessive pre-sunrise power for each specified day and the length of time involved is set forth in the following table (DuPage Ex. 13, p. 6; Stipulation 3):

Date	Power (Watts)	Time
1967:		
November 4 (Sat.)	1,026	Obs. to 30 min.
December 9 (Sat.)	1,000 to 1,600	1 hr. to 1 hr. 30 min.
" 16 (Sat.)	" " "	1 hr. to 1 hr. 30 min.
" 17 (Sun.)	" " "	Obs. to 30 min.
" 20 (Wed.)	" " "	Obs. to 27 min.
" 22 (Fri.)	" " "	1 hr. 30 min. to 2 hrs.[1]
" 23 (Sat.)	" " "	1 hr. 30 min. to 2 hrs.[1]
" 24 (Sun.)	" " "	34 min. to 1 hr. 4 min.[1]
" 30 (Sat.)	" " "	1 hr. 30 min. to 2 hrs.[1]
1968:		
January 6 (Sat.)	1,000 to 1,600	1 hr. 30 min. to 2 hrs.[1]
" 13 (Sat.)	" " "	1 hr. 30 min. to 2 hrs.[1]
" 20 (Sat.)	" " "	1 hr. to 1 hr. 30 min.
" 21 (Sun.)	" " "	Obs. to 30 min.
" 27 (Sat.)	" " "	1 hr. to 1 hr. 30 min.
February 3 (Sat.)	" " "	1 hr. 1 min. to 1 hr. 34 min.[1]
" 4 (Sun.)	" " "	Obs. to 30 min.[1]
" 10 (Sat.)	" " "	1 hr. 2 min. to 1 hr. 32 min.[1]
" 14 (Wed.)	1,026	3 hrs. to 4 hrs. 10 min.[1]
" 24 (Sat.)	1,241 to 1,318	3 hrs. 22 min.[1]
March 2 (Sat.)	1,357	Obs. to 30 min.[1]
November 2 (Sat.)	1,000 to 1,600	1 hr. to 1 hr. 30 min.[1]
December 7 (Sat.)	" " "	1 hr. to 1 hr. 30 min.
" 8 (Sun.)	" " "	Obs. to 30 min.
" 21 (Sat.)	" " "	1 hr. to 1 hr. 30 min.
" 22 (Sun.)	1,131	17 minutes.
" 28 (Sat.)	1,000 to 1,600	1 hr. 4 min. to 1 hr. 34 min.
" 29 (Sun.)	" " "	Obs. to 34 min.

[1] Portions occurred after sunrise (i.e., station operated with pre-sunrise power after sunrise).

22. The above table shows that out of a total of 27 days on which WCKD operated with excessive pre-sunrise power, all were on either Saturday or Sunday except three days that fell on either Wednesday or Friday. WCKD's chief radio operator began the early morning operation of the station Monday through Friday for the period in question. From 6 AM to 9 AM he was alone at the station and performed other duties (announcing, receiving weather reports, police informa-

[13] Sunrise indicated in the Naval Observatory publication compared with the time entered in WCKD's operating log showing when operating power was changed from 500 watts to 5,000 watts is set forth in a table prepared by the Bureau and appearing at pp. 15–16 of its proposed findings of fact. The tabular data is derived from DuPage Ex. 13, p. 34, Central Ex. F, and Stipulation 3.

[14] Section 73.52(a) of the rules governing overpower provides that the operating power of a standard broadcast station shall be maintained as near as practicable to the licensed power and shall not exceed the limits of five percent above the licensed power.

tion, road condition information, school closings and menus) besides the technical operation of the station. He was involved in pre-sunrise overpower operation of the station on February 14, 1968.[15] On Saturdays and Sundays the early morning operation of WCKD was begun by part-time third class radio operators (DuPage Ex. 13, p. 6; Stipulation 4, p. 3). Mr. Robert U'Ren, a part-time radio operator who held a radiotelephone third class permit with broadcast endorsement, was responsible for pre-sunrise overpower operation of WCKD on 15 of the days, all of which except one fell on either Saturday or Sunday. He was discharged by Canyon on May 5, 1968, after receipt of an "Official Notice of Violation", dated May 21, 1968, from the Commission, noting excessive power violations during the tours of duty of U'Ren. Other third class radio operators involved in pre-sunrise overpower operation of the station included Messrs. Stephen Pence (6 days), John Reidy (3 days) and Jay Jennings (1 day) (DuPage Ex. 13, pp. 9, 10, 42; Stipulation Nos. 3 and 4).

23. Several factors emerge from the record that may well account for operation of the station with excessive operating power. One of the likely technical factors resulting in excessive pre-sunrise operation stems from the unorthodox and unauthorized modification of WCKD's transmitter to reduce operating power from 5,000 watts to 500 watts. The Commission telegram which gave Canyon authority to operate WCKD with pre-sunrise power of 500 watts specified the following: "No objection use kit furnished by transmitter manufacturer to reduce transmitter output power. Necessary make within 90 days equipment performance measurements to show that transmitter meets requirements of Section 73.40. . . . Retain measurements in Station file." (DuPage Ex. 13, p. 39). The transmitter specified in Canyon's license and used by WCKD is a Gates type BC–5B designed for power output of either 5,000 watts or 1,000 watts (DuPage Ex. 13, pp. 8, 14; Stipulation 1; Tr. 1038, 1097). Operating power of the transmitter is changed by a switch that functions to reduce the plate voltage on the final stages of the transmitter (Tr. 1038, 1043–1045). Canyon's chief radio operator modified WCKD's transmitter twice, once in November 1967 and again in February 1969 (DuPage Ex. 22; Tr. 1039, 1042–1044). The manufacturer's kit specified in the Commission's telegram was not used by Canyon for either modification because it was considered too expensive (Tr. 1041–1042, 1044, 1064). The first modification was made without any addition or change in the components of the transmitter.[16] Blotter told Larson to do it as inexpensively as he could (Tr. 1044). The modification merely consisted of changing transmitter output power from 5,000 watts to 500 watts by a flick of the switch and detuning the antenna circuit until the antenna ammeter indicated 4 amperes of antenna current corresponding to an output

[15] Stipulation 4, page 3, shows that Mr. Larson was responsible for operation of WCKD with excessive *daytime* power on this date. However, Stipulation 3 shows that WCKD operated with excessive *pre-sunrise* power on this date and that operation of the station with excessive *daytime* power was not involved on February 14, 1968.

[16] Canyon did not notify the Commission or request authority to make the first modification (Tr. 1108).

power of 500 watts [17] (Tr. 1045). This modification was a compromise in order to fulfill the requirement of reducing power to 500 watts for pre-sunrise operation (Tr. 1039). The chief engineer who made the modification indicated by oral testimony that it "was a clumsy way of doing it" because it represented "a considerable reduction in the efficiency of the transmitter" but "I didn't have all of the necessary ingredients so I did it the best way I could with what I had" [18] (Tr. 1038, 1040, 1060). He had talked to a sales engineer from the Gates Company about the purchase of a kit at one time but this representative never reappeared. This engineer indicated that the modification actually later made "was okay" (Tr. 1042). Larson instructed the other radio operators at the station concerning the power change (Tr. 1045, 1066). He also admitted that he did not review the Commission's rules governing transmitter modification and "I realized at the time perhaps I was violating the Commission's rules . . . but the reason I did it was because of convenience." (Tr. 1063). In Larson's opinion, excessive pre-sunrise operation could have been caused by failure of the radio operator involved to follow instructions in changing power by either not changing the antenna loading tuning after the transmitter was switched to a different power or not switching the power after the antenna loading tuning was changed (Tr. 1052, 1065). Explained in simpler terms of operating procedures, excessive pre-sunrise power could have resulted "because an operator did not turn the knob to the proper marking" or because the operator on duty "forgot to turn the knob" to the proper marking (Tr. 1065). In mitigation of these omissions Larson stated: "I realize that an early morning man is involved in programming and some of these technical details are overlooked (Tr. 1065).

24. WCKD's chief radio operator did not examine the operating logs with particular respect to whether the station was operating in accordance with its authorized power because he had confidence in the operators (Tr. 1052–1053). When he occasionally examined the operating logs closely, and noted wide departures in operating power, he assumed these were attributable to the operator's reading modulation peaks or being inattentive to getting proper readings. Larson conceded he was negligent in this respect (Tr. 1058). During the period from October 1967 through January 1968, Larson reviewed the programming logs of WCKD and in the same time span he periodically reviewed the transmitter logs in groups for other matters but did not find any technical discrepancies which would indicate that the station was not being operated in accordance with the terms of its license and the Commission's rules (Tr. 994–1000).

25. Another factor accounting for the operation of WCKD with excessive pre-sunrise power involves a defective antenna ammeter

[17] The 28.5 ohms antenna resistance specified in Canyon's station license (DuPage Ex. 13, p. 14) in combination with 500 watts authorized operating power yields 4.19 amperes for the antenna current calculated in accordance with Section 73.51 of the Rules.

[18] Equipment performance measurements were made on December 18, 1967 on both modes of operation after the first modification of the transmitter. Technical deficiencies in the equipment performance measurements were corrected between November 12, 1968 and April 11, 1969 by exchange of correspondence between Canyon and the Commission (DuPage Ex. 13, pp. 44–69).

which was used for the normal daytime and pre-sunrise operations. Besides the regular antenna ammeter located at the base of the antenna, WCKD also uses a remote meter located about 200 feet from the base meter (Tr. 1047). The remote antenna ammeter is not always free of drift (Tr. 1048). The meter is not marked to indicate five percent tolerance above authorized power (Tr. 1346). Canyon's chief engineer indicated that occasionally, when WCKD terminated its daytime operation, the needle of the antenna ammeter did not always return to zero on the scale of the meter but would stop at about 6 amperes. When this happened it was necessary to tap the meter sharply to return the needle to zero (Tr. 1348). If the radio operator on duty failed to observe the antenna ammeter when the needle did not return to zero, the antenna current could indicate 6 amperes when the transmitter was turned on for pre-sunrise operation. In order to achieve operating power in excess of 1,000 watts for pre-sunrise operation, a transmitter efficiency of 137 percent would be required. This is an impossibility (Tr. 1351). Nevertheless, because of a defective antenna ammeter, among other reasons, entries were made in WCKD's operating logs which indicate overpower for pre-sunrise operation in excess of 1,000 watts (Stipulation 3). The replacement cost of the type of antenna ammeter used by WCKD is about ten or fifteen dollars (Tr. 1349, 1350). Despite the low cost, the meter was never replaced (Tr. 1349). The operating log for February 28, 1970 shows pre-sunrise entries for antenna current of 6 amperes and 6.1 amperes corresponding to 1,026 watts and 1,062 watts, respectively [19] (Central Ex. M). This corresponds to more than two times the authorized pre-sunrise power.

26. WCKD's chief engineer also indicated that still another possible cause of operation with excessive power was the responsible radio operator reading the antenna current in the presence of modulation or on modulation peaks (Tr. 1057–1059, 1100, 1112).

27. In the second modification of the transmitter, an inexpensive 2,000 ohm resistor designed to dissipate 500 watts was inserted in series with the voltage supply to the final radio frequency amplifier with the transmitter in the 1,000 watt mode of operation.[20] For 500 watt operation, compensation was also made for the audio level by adjustment of the audio pad and audio limiter (DuPage Ex. 17, Tr. 1043, 1044).

Operation With Excessive Daytime Power

28. WCKD's operating logs for the period indicated from October 1, 1967 to December 30, 1968, also disclose that the station operated overpower in excess of five percent above authorized daytime power, four times in 1967 and 28 times in 1968. The following table shows the overpower and length of time involved (Stipulation 3):

[19] $P=I^2R=6^2 \times 28.5=1,026$ watts, where P is power in watts, I is antenna current in amperes and R is antenna resistance in ohms.

[20] Canyon did not request authority to modify WCKD's transmitter the second time until January 14, 1971 (DuPage Ex. 19). By telegram dated January 21, 1971, the Commission notified Canyon that there was no objection to the second modification (DuPage Ex. 20). The equipment performance measurements on the second modification had been completed May 8, 1970 (DuPage Ex. 21).

Date	Power (watts)	Time
1967:		
Dec. 22 (Fri.)	5,427	Obs. to 30 min.
" 23 (Sat.)	5,271 to 5,427	2 hrs. 30 min. to 3 hrs. 30 min.
" 24 (Sun.)	5,271	Obs. to 30 min.
" 30 (Sat.)	5,271	30 min. to 1 hr. 30 min.
1968:		
Jan. 27 (Sat.)	5,271	Obs. to 30 min.
" 28 (Sun.)	5,588 to 6,412	4 hrs. 2 min. to 4 hrs. 32 min.
" 29 (Mon.)	5,587 to 6,412	5 hrs. 14 min. to 5 hrs. 44 min.
Feb. 3 (Sat.)	5,271 to 6,075	6 hrs. 28 min. to 7 hrs. 31 min.
" 4 (Sun.)	5,586 to 6,412	3 hrs. 30 min. to 4 hrs. 30 min.
" 10 (Sat.)	5,271	Obs. to 1 hr.
" 11 (Sun.)	5,427 to 5,747	4 hrs. to 4 hrs. 30 min.
" 17 (Sat.)	5,422	1 hr. to 2 hrs.
" 18 (Sun.)	5,271 to 5,747	4 hrs. 30 min. to 5 hrs.
" 24 (Sat.)	5,271 to 5,586	1 hr. 36 min. to 2 hrs. 6 min.
" 25 (Sun.)	5,271 to 5,586	5 hrs. to 5 hrs. 30 min.
Mar. 1 (Fri.)	5,427	Obs. to 30 min.
" 2 (Sat.)	5,271 to 6,243	2 hrs. to 3 hrs.
" 8 (Fri.)	5,427 to 5,586	5 hrs. to 5 hrs. 30 min.
" 10 (Sun.)	5,427 to 5,747	5 hrs. to 5 hrs. 30 min.
" 16 (Sat.)	5,271 to 5,586	3 hrs. to 5 hrs. 30 min.
" 17 (Sun.)	5,271 to 5,747	4 hrs. to 5 hrs.
" 21 (Thurs.)	5,271 to 5,427	1 hr. to 1 hr. 30 min.
" 24 (Sun.)	5,271 to 5,586	2 hrs. to 4 hrs. 30 min.
Apr. 21 (Sun.)	5,271 to 5,586	3 hrs. 30 min. to 5 hrs.
May 5 (Sun.)	5,271 to 6,412	5 hrs. 30 min. to 6 hrs.
" 11 (Sat.)	5,271	Obs. to 31 min.
" 12 (Sun.)	5,271	Obs. to 30 min.
" 18 (Sat.)	5,586	6 hrs. 30 min. to 7 hrs.
Dec. 8 (Sun.)	5,271 to 5,349	4 hrs. 30 min. to 6 hrs.
" 21 (Sat.)	6,159 to 6,841	4 hrs. 30 min. to 5 hrs. 30 min.
" 28 (Sat.)	5,271 to 5,349	3 hrs. 30 min. to 6 hrs.
" 29 (Sun.)	5,271 to 5,349	5 hrs. to 5 hrs. 34 min.

29. The above table shows that of the 32 days the station was operated with excessive daytime power, five days fall on Monday, Thursday or Friday. Mr. Blotter was on duty May 11, 1968. The remaining days were distributed as follows: Robin U'Ren, 22 and a fraction days; Stephen Pence, 4 days; John Reidy, one and a fraction days; William Argall, 1 day; Gregg Hill, 1 day; and Jay Jennings, 1 day (Stipulation 4, pp. 3, 4).

30. Although the record is not precise as to the power output capability of WCKD's transmitter, there is an indication from Larson's testimony that it may be somewhere between 5.5 kilowatts and 8 kilowatts (Tr. 1097, 1105). The only reason given for the operation of the station with excessive daytime power was that the operators on duty at WCKD may have been reading the antenna current during modulation peaks (Tr. 1100).

Operation Past Sunset

31. No difficulty was experienced by WCKD's radio operators in making entries in the operating logs concerning the local time for the period in question, whether in Central standard time or Central daylight time, depending upon whichever was in effect locally. Entries in WCKD's operating logs were kept in local time (DuPage Ex. 13F, Tr. 737, 855, 861–867, 938, 1011, 1013). WCKD's operating logs for the period in question in 1967 and 1968 show that the station signed off

the air at the end of the broadcast day [21] either early, on time or late, as summarized in the following table (DuPage Ex. 13, pp. 1 to 4; Stipulation 2):

Month	Days	Local Time	Remarks
1967:			
Oct.	1 through 28	CDT	WCKD signed off on time.
"	29	CST	WCKD signed off on time.
"	30 and 31	CST	WCKD signed off 1 hr. late.
Nov.	1 through 30	CST	WCKD signed off 1 hr. late.
Dec.	1	CST	WCKD signed off 1 hr. 15 min. late.
"	2 through 31	CST	WCKD signed off 1 hr. late.
1968:			
Jan.	1 through 25	CST	WCKD signed off 1 hr. late.
"	26 through 31	CST	WCKD signed off 45 min. late.
Feb.	1 through 29	CST	WCKD signed off on time.
Mar.	1 through 26	CST	WCKD signed off on time.
"	27	CST	WCKD signed off 30 min. late.
"	28 through 31	CST	WCKD signed off on time.
Apr.	1 through 27	CST	WCKD signed off on time.
"	28	CDT	WCKD signed off 1 hr. 30 min. early.
"	29 and 30	CDT	WCKD signed off 1 hr. early.
May	1 through 31	CDT	WCKD signed off 1 hr. early.
June	1 through 30	CDT	WCKD signed off 1 hr. early.
July	1 through 31	CDT	WCKD signed off 1 hr. early.
Aug.	1 through 31	CDT	WCKD signed off 1 hr. early.
Sept.	1 through 30	CDT	WCKD signed off 1 hr. early.
Oct.	1 through 26	CDT	WCKD signed off 30 min. early.
"	27 through 31	CST	WCKD signed off 30 min. late.
Nov.	1	CST	WCKD signed off 1 hr. 15 min. late.
"	2 through 30	CST	WCKD signed off 1 hr. late.
Dec.	1 through 7	CST	WCKD signed off 1 hr. late.
"	8	CST	WCKD signed off 1 hr. 5 min. late.
"	9 through 31	CST	WCKD signed off 1 hr. late.

Mr. Blotter was on duty December 17, 1968, when late sign-off occurred. The remaining late sign-off days were distributed among the operators as follows: William Argall, 112 days; John Reidy, 19 days; Robin U'Ren, 15 days; Jay Jennings, 14 days; and John Temple, 2 days (Revised Stipulation 4, pp. 1, 2).

32. By various letters dated October 25, November 2 and December 7, 1967, Canyon requested waiver of the Commission's Rules to permit Station WCKD to operate one hour past sunset as specified in its license (DuPage Ex. 13, pp. 27–29). By letter dated January 19, 1968, the Commission did not grant Canyon's request and pointed out that, in order to control objectional nighttime interference, times, modes of operation or powers other than authorized were not permitted (DuPage Ex. 13, p. 30). The Commission's letter was received by Canyon on or about January 26, 1968 (DuPage Ex. 13D, Tr. 829, 831). As reflected in the table above showing operation past sunset, WCKD continued to sign off past sunset after January 26, 1968, specifically 45 minutes late, 5 days from January 27 thru 31, 30 minutes late on March 27, 30 minutes late 5 days in October, 1 hour and 15 minutes late on November 1, 1 hour late the balance of November, and 1 hour late all of December, 1968.

33. The circumstances surrounding the operation of WCKD past sunset during the months of October, November, December, 1967 and November and December, 1968, were the subject of testimony in this

[21] WCKD's broadcast day terminated at sunset as specified in Canyon's license.

proceeding. There are several reasons given by Blotter regarding the late sign-offs which occurred between October, 1967 and December, 1968. As noted previously, in April 1967, pursuant to the Uniform Time Act, the Upper Peninsula of Michigan began to observe Central daylight time.[22] According to Blotter's understanding, since World War II, the Upper Peninsula had until April 1967 been on Eastern standard time for the entire year (DuPage Ex. 13, pp. 1, 2). Therefore, according to Blotter, the station always converted its license time, expressed in terms of CST, to local time (Eastern standard) by adding one hour (DuPage Ex. 13, p. 2). However, though some people in the area expressed a preference for Eastern time and some parts were informally observing Eastern time, officially the area was in the Central time zone (DuPage Ex. 13A). According to Blotter, when the Uniform Time Act first went into effect in April 1967,[23] there was no problem in sign-off since Central daylight time coincided with Eastern standard time, and, therefore, the one hour adjustment to coincide with CST specified in the license required no change (DuPage Ex. 13, p. 2). It was in October 1967, however, when the area was to officially return to CST, that, according to Blotter, the confusion began (DuPage Ex. 13, p. 3).

34. Although the various newspaper articles during the months of October, November and December 1967, and November and December 1968, reflect considerable controversy over which time zone should be deemed to apply in the Michigan Upper Peninsula, they do not indicate any confusion as to which time zone was applicable. (DuPage Ex. 13, Attachment 2). Nevertheless, Blotter contends that there was much confusion. He testified that he did not know exactly what time to observe in the Ishpeming area, getting the pressure from the city, state and school officials (Tr. 735). When asked whether these communications had an impact on his state of mind, Blotter said that "it was just a confusion as to nobody knew what the official time was" including himself (Tr. 736). Blotter stated that in years previous to 1967, the station signed off at five o'clock, but when the confusion occurred, "we just thought we would be right and satisfy the local community and stay on at that time accepted in the area" (Tr. 733). He further testified that "there was no way to determine" what was the time that was being accepted in the area (Ibid.). Notwithstanding the local confusion, Blotter admitted that he knew Canyon's license was expressed in terms of Central Standard Time (Tr. 752–3), and when asked what time the station would give its listeners, he responded that the disc jockeys would give two times, expressed in CST and EST or tell people to take their choice (Tr. 755–6).

35. According to Blotter, he was not aware that the station was violating its license when it signed off at 5:15 PM CST in November 1967 (Tr. 750). He testified he was aware it signed off at 5:15, but was not aware of particularly what time the station was observing—whether it was 5:15 CST or EST (Tr. 751). According to Blotter, he and Larson discussed this matter in October–November 1967 (Tr. 751–2),

[22] Central daylight time runs from late April to late October, each year.
[23] As noted, supra, the Uniform Time Act specified the dates when advanced time (daylight savings time) went into effect.

but the determination of the exact time—whether to sign off in accordance with Central Standard Time or Eastern Standard Time—was not clear to them.[24] Blotter expressed his belief that the station followed the previous sign-off times the station had always followed as a service in the area (Tr. 750). Stated otherwise, it was Blotter's understanding that certain local sign-off times had become customary (Tr. 733–4).

36. Blotter's claim of confusion concerning the applicable time zone as a cause of late sign-offs is not consistent with other aspects of Station WCKD operation. First, weekend operators normally showed up to work on time (Tr. 1025) and the station's clock was presumably on CST (Tr. 862) during October, November and December 1967. Secondly, although the station signed off late by one hour, few of the many morning violations occurred in graduations of one hour. Blotter was unable to explain why sign-on was not confusing (Tr. 926–928); [25] and totally unexplainable is how, due to the time confusion, the station signed off 30 minutes late in October 1968 [26] (Tr. 854) with respect to late sign-offs in November 1968, Blotter testified that along with the confusion this was due to "a technical error" caused by the secretary's copying of sign-off times from old program logs (Tr. 872–76; 884–5), and it was these logs which dictated sign-on and sign-off (Tr. 1107) and again, there was no consistently corresponding violations of one hour in the morning.

37. Further evidence which does not square with Blotter's alleged confusion revolves about the station's operation during the last five days of January, after Blotter received a letter dated January 19, 1968 (Attachment 6, DuPage Ex. 13) from the Commission informing him that his request for a one-hour delay in sign-off was denied. Not only does the request itself (DuPage Ex. 13, p. 27) evidence an understanding of what time was, in fact, applicable to the station, but also WCKD continued to operate beyond its authorized hour until February 1. Blotter attributed these violations to a change in office girls (Tr. 830–31). He was at the station on the five days in question (Tr. 831).

38. It is Blotter's contention that he penalized himself "due to the confusion" as to the applicable local time, and signed off earlier than required during the summer of 1968 (Tr. 843). Blotter at one point testified that he construed the station's authorization to operate according to CST as an authorization to operate one hour later if the area went to CDT (Tr. 845). His subsequent testimony indicates however that the early sign-off was in fact a personal mistake stemming from his own confusion regarding sign-off time when local time was CDT and not CST (Tr. 851). While Blotter testified he personally made the decision as to sign-off early during the summer of 1968, he could not recall whether he made the decision to sign-off late in October 1968 (Tr. 854).

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[24] According to Larson's testimony, he could recall no discussion with Blotter concerning sign-off procedures during the period October, November, December 1967 (Tr. 989–90) and there was no occasion for him, during this same period, to reach a decision personally as to when the station should be signed off (Tr. 990).

[25] Larson stated that the station had no difficulty in making the necessary adjustment of switching from daylight to standard time and vice versa in order to sign-on at 6:00 AM (Tr. 955).

[26] The station signed off 45 minutes late between January 27 to the 31st.

Official Notice of Violation

39. WCKD was inspected by a Commission engineer on May 7, 1968. Subsequently, an Official Notice of Violation was issued May 21, 1968 involving some ten citations including one for operation of the station with power in excess of five percent above authorized power and one for no provision being evident that the transmitter had been modified to effect satisfactory operation at 500 watts during periods of pre-sunrise service (DuPage Ex. 13, pp. 40–41). Canyon responded to the Notice of Violation by letter dated June 4, 1968 (DuPage Ex. 13, pp. 42–43). However, WCKD again operated with pre-sunrise power in excess of five percent of licensed value on November 2, December 7, 8, 21, 22, 28 and 29, 1968 and with daytime power in excess of five percent of licensed value on December 8, 21, 28, 29, 1968, as previously indicated (Stipulation 3). The June 4, 1968 response to the Notice of Violation indicated that the radio operator responsible for overpower operation of the station was discharged May 5, 1968. The response in connection with the modification of the transmitter indicated that "Our transmitter has a 'low power' switch that is utilized to reduce to conform to PSA". However, as previously indicated, the switch merely changed the power output of the transmitter from 5,000 watts to 1,000 watts.

Supervision of WCKD Operations

40. Larson, who was General Manager and chief engineer of WCKD in 1967 and 1968, was responsible to Mr. Blotter for the discharge of his duties (Tr. 744). Blotter was the only officer, director or stockholder of Canyon who resided in the Ishpeming area (Tr. 747). He spent most of his time on sales (Tr. 744). Blotter instructed Larson, when the latter became General Manager, to conform to the Standards of Good Practice, follow NAB Regulations, and "live up to [the] license and perform his duties in accordance with [Commission] regulations" (Tr. 746–7). They conferred on many items concerning the station during 1967 and 1968 [27] (Tr. 744).

41. According to Blotter, it was Larson's sole responsibility in October–November 1967 to determine sign-on and sign-off times (Tr. 748). At one point in his testimony, Larson agreed that it was part of his responsibility to consider the sign-off procedures of the station but that he assumed the office staff took care of it (Tr. 1008). Larson stated subsequently, however, that it was the owner's responsibility to be concerned with sign-on and sign-off times and to check program logs with the license and that he (Larson) would have some responsibility over what happened after that (Tr. 1107). He also testified that Blotter did not ask him what he thought was the appropriate time to sign-off, either in the winter of 1967–1968 or in November–December 1968 (Tr. 1030–31). Larson also testified that although there may have been some discussion about the Commission's letter of January 19, 1968, denying the request to operate late, he could not recall whether he saw the letter (Tr. 1006). Larson did state, however, that he was not aware of any operating irregularities regarding sign-

[27] The record does not reflect that Blotter established any procedures for regularly reviewing Larson's work (Tr. 747).

off during the fall of 1967 (Tr. 1008). When clarifying whose decision it may have been to sign-off late in the fall of 1967, Blotter said that due to the confusion as to what time to recognize, it was possibly a joint decision (Tr. 749–50),[28] his recollection having been confused in the process of preparing pleadings and responding to violations (Tr. 750). As previously noted herein, Larson recalls no such discussion,[29] and the denial of the request for waiver according to Larson, did not change station operation with regard to sign-off time (Tr. 1005). In spite of the asserted confusion on his part regarding the appropriate time to be observed, Blotter admits that he did not find out how WJPD, the other station in Ishpeming, handled their reduction in power at sunset (Tr. 806–806). No effort was made by Blotter to find out from any other daytime station in the area what time it was signing off and he did not tell Larson to do so (Tr. 813).

42. Blotter, with his limited knowledge of engineering, accepted Larson's explanations regarding transmitter logs (Tr. 765), though he did review the program logs and insured that they were in accordance with the Commission's rules (Tr. 764). He never felt the need to contact a consulting engineer with regard to the operation of WCKD until this remand proceeding because he always assumed that everything was being operated in accord with the rules (Tr. 764–5). Notwithstanding the claimed confusion over the applicable time during the fall of 1967, when the area switched from CDT to CST in October 1968, Blotter gave no instructions to Larson or any other member of the WCKD staff relative to sign-off procedures (Tr. 881).[30] He does not know whether Larson so instructed anyone (Tr. 881), but he did not tell him to do so (Tr. 882). In addition, he never inquired of Larson whether he was reviewing the transmitter logs on a daily basis (Tr. 907) and left the briefing of the operators to Larson (Tr. 897). Blotter did discuss operational discrepancies with Robin U'Ren prior to termination of employment (Tr. 897). Larson did not review the transmitter logs systematically (Tr. 994). He did review them in groups to ascertain the operating profile of the transmitter prior to a trouble period (Tr. 994–95). Blotter did not have occasion to ask Larson about his daily supervision of the transmitter logs (Tr. 907–908).

43. Blotter did not specifically recall how the Naval Observatory Charts, used to determine local sunrise and sunset time for sign-on and sign-off, were acquired, although he was sure that he and Larson discussed it (Tr. 846). He never undertook to determine whether the station was switching to full power in accordance with the Naval Observatory Charts (Tr. 785). Blotter did not understand what

[28] Blotter presumed that once he wrote the request to the Commission for late sign-off authorization, he could go ahead and conduct his operation as if the waiver had already been granted (Tr. 836–838). He did not seek the advice of counsel on this matter (Tr. 822, 933).

[29] Larson reaffirmed that he could not recall any discussion with Blotter concerning sign-off (Tr. 1008, 1030). Moreover, with regard to the fall of 1967, Larson stated that, as a practical matter, the office secretary would have exercised the responsibility for deciding sign-on and sign-off times because she probably would have referred to past practices (Tr. 990).

[30] After Blotter received the Commission's letter denying his request for late operation, he posted notifications of sign-on and sign-off times on the wall in the station (Tr. 906) and mentioned to Larson that the station was to sign-off according to CST beginning in February 1968 (Tr. 831).

operating according to one's "basic instrument of authorization" meant (Tr. 786), and said that he had no one locally to ask (Tr. 786). He does not recall whether Larson understood it (Tr. 786–87).

44. As noted, *supra*, many of the violations occurred on the weekends. Although Blotter left the responsibility for supervising the operators to Larson (Tr. 897), Larson said that the weekend operators did not require close observation. Since Larson was not at the station on the weekends (Tr. 1087–88), Blotter could observe them more closely than Larson, according to the latter (Tr. 1087). Larson was unable to state, however, just how much time Blotter spent at the station on weekends (Tr. 1088).

45. According to Larson, he was aware (Tr. 1070) of the Commission's Official Notice of Violation (DuPage Ex. 13, Attachment 12, pp. 40–41), but with regard to the ensuing correspondence between Blotter and the Commission, Larson supplied information to Blotter but did not compose the letters (Tr. 1073). In Larson's opinion, Blotter, while not qualified as an electronics engineer, had as good a working knowledge of the technical problems of the station as anyone else he has known (Tr. 1074). Larson had enough confidence in Blotter so that when he told Blotter something the latter got the point, and if Blotter had any questions he would ask him (Tr. 1076).[31] In addition, Larson stated that nontechnical matters were basically Mr. Blotter's responsibility (Tr. 1078). When asked whether he presented the equipment problem concerning reduction in power for pre-sunrise operation to Blotter, Larson said that he probably did but that Blotter was probably busy and that engineering was his, Larson's, function and that this adjustment was his sole decision (Tr. 1064–65). Because of Blotter's limited engineering knowledge and experience, he relied on Larson to make the necessary modification properly on the transmitter to reduce its power to 500 watts (Tr. 769–770). Blotter first learned about the possibility of excessive pre-sunrise power violations about December 23, 1968, when Central filed its petition for reopening the record with the Commission (Tr. 777–779). He learned of the late one-hour operation in November and December 1968 also from the same pleading (Tr. 878).

Future Compliance

46. DuPage Exhibit 14 constituted DuPage's proposal for the manner in which it intends to operate its new station should its application be granted. Attached to this exhibit are the biographies of Frank Blotter and Lois Blotter, the two principals of the applicant, and Glenn E. Webster, the intended full-time Technical Director-Chief Engineer. Frank Blotter will serve as general manager with general supervisory responsibility over the programming, sales and engineering departments. Mr. Webster would be in charge of the day-to-day technical operation of the station. Lois Blotter would have supervisory responsibility for the station in the areas including financial matters, mail, state and federal reports, personnel, and community relations. Lois Blotter's biography indicates that she has been Secretary to the Chairman and Office Manager of the Chairman's

[31] This was in the context of whether Larson reviewed Blotter's letters to the Commission.

Division of the Peoples Gas Light and Coke Company in Chicago, in addition to having been responsible at one time for the processing of special applications (DuPage Ex. 14, Attachment D). Glenn E. Webster has held a First Class Radiotelephone license over 40 years, and is a consulting engineer in the communications field. Webster was active as a consulting radio engineer as early as 1929 when he supervised the construction of pioneer radio stations. He has a B.S. degree in electrical engineering. From 1962 to date, he has been the President and owner of Webster Engineering Company which is engaged in consulting engineering and management services for many branches of the communications industry throughout the Midwest. His organization designs, develops, and, in some cases, actually installs the complete station or system (radio, television, CATV, etc.) on a turn-key basis (DuPage Ex. 14, Attachment E).

47. The technical operation of the new standard broadcast station at Elmhurst would be organized as follows: (DuPage Ex. 14, pp. 2–4; Ex. 16)

a. The initial construction and adjustment of the proposed directional antenna system will be under the supervision of a recognized engineering consulting firm.

b. A qualified person will be employed as the Technical Director and Chief Engineer of the new station, as required by the Rules. It will be the responsibility of the Technical Director to see that:

1. Proper fencing will be constructed around the base of each antenna tower.

2. The ground system will be inspected once a week to insure that it is complete and in good condition.

3. Each meter will be labelled as to its function.

4. Properly licensed radio operators will be employed and instructed in their duties including correct maintenance of operating, maintenance and program logs and appropriate station identification at specified intervals.

5. The transmitter equipment will be inspected five days each week as required by the Rules.

6. Operating, maintenance and program logs, as well as equipment performance measurements, will be made available at all times as required by the Rules.

7. Operating power, antenna base currents in the directional antenna system, field strength at monitoring points and excursions in modulation will be maintained within the requirements of the Rules or as indicated in the license.

8. If the transmitter functions improperly the station will cease operation if it cannot be corrected, and the Commission's Engineer in Charge of the appropriate field office will be notified as required by the Rules.

9. Remote meters will be calibrated once a week as required by the Rules.

10. Equipment performance measurements will be made as required by the Rules.

11. Station authorizations, modifications and radio operator permits will be posted as required by the Rules.

12. Lighting and painting of the antenna towers will be maintained as required by the Rules or as indicated on the license.

13. Steps will be taken to insure that radio operators make log entries as required by the Rules.

14. The station will adhere to sign-on or appropriate change in the modes of operation at sunrise, and sign-off at sunset specified in the basic instrument of authorization.

15. Spurious and harmonic radiations will be attenuated.

16. Transmission line will be maintained in good condition.

17. Calibration curves will be provided for remote meters.

18. Phase monitor will be properly and regularly calibrated.

19. Properly operating modulation monitor will be provided.
20. Maintenance log will include signed statement of required inspection, record of tower lighting inspection, weekly antenna base current remote meter calibrations and external frequency checks.
21. Engineer in Charge of District will be notified when required.

48. Unlike the operation at WCKD, the Elmhurst operation will have a separate Chief Engineer, a separate general manager (Tr. 756), and an office administrator, Office Manager (Tr. 758–59). In addition, there will be a considerably larger staff and a standard pattern of time in existence (Tr. 736). Although Blotter states that he has never implemented a proposal for operation and administration at WCKD along the lines described in DuPage Ex. 14, pp. 13–14 (Tr. 759–760), he contends that he has learned a lot from this proceeding and will be better equipped to review the transmitter, program and maintenance logs (Tr. 761) to see that they are conforming to the Commission's rules (Tr. 762). These will be reviewed with Mr. Webster and if he disagrees, then with a consulting engineer, with the final decision up to Blotter (Tr. 762). Although Blotter testified he has limited ability to review transmitter logs (Tr. 765, 769), he believed that the transmitter logs at WCKD were being kept in October 1970, in accordance with Commission rules (Tr. 769), though they have not been shown to anybody except Larson (Tr. 769). According to Blotter, he was at the time of hearing examining the transmitter and program logs at WCKD periodically (Tr. 769), and to guard against excessive power he was putting up notices every month (Tr. 776). Blotter states that if the Commission should make an error in writing a license, in the incorrect time, he would ask for a clarification and have the proper license issued (Tr. 914), and that he would not submit to pressures from the community regarding sign-on or sign-off (Tr. 932). Blotter also states that times will be posted in the operators' rooms as well as indicated on the transmitter program logs (Tr. 936). Should the Elmhurst application be granted, Blotter will devote full time to the operation of the station there (Tr. 894).

CONCLUSIONS

1. The facts developed in this proceeding concerning the operation of Station WCKD at Ishpeming, Michigan under the supervision of Mr. Frank Blotter cover six distinct categories of infractions of either the Commission's Rules or the terms of the station license. In the aggregate, they cover a period of 457 days from October 1967 through December 1968. Canyon Broadcasters, Inc. was the licensee of Station WCKD during that time.[32] Mr. Blotter was president, director and 27.6 percent stockholder of Canyon and he is the president, director and 51 percent stockholder of DuPage County Broadcasting, Inc. Canyon was authorized to operate Station WCKD as a Class III station, daytime only, on 970 kHz with a power of 5,000 watts, utilizing a non-directional antenna. Canyon was given pre-sunrise authority on October 30, 1967 to operate the station with 500 watts power.

[32] Subsequent to the hearing, the Commission approved an assignment of the license for WCKD from Canyon to a new owner.

Premature Presunrise Operation (before 6 a.m.)

2. The first category of violations involves the operation of WCKD with pre-sunrise power prior to 6 AM *local standard time* up to the end of August 1968, and prior to 6 AM *local time* thereafter. Section 73.99 of the Rules, as amended September 1, 1968, permitted WCKD to operate with pre-sunrise power beginning at 6 AM *local time* instead of 6 AM *local standard time*. There is no provision in the Rule permitting any deviation in punctuality concerning the commencement or termination of pre-sunrise operation. Apart from violations of 5 minutes or less on 166 days, over the period in question, WCKD began pre-sunrise operation prematurely by 6 minutes and 30 minutes on 2 days in December 1967, 10 minutes on 1 day in March, 17 minutes on 3 days in October, 30 minutes on 1 day in November, 19 minutes on another day in November, 17 minutes on 4 other days in November, 6 minutes and 17 minutes on 2 days in December 1968. Thus, WCKD operated prior to pre-sunrise in excess of 5 minutes on 14 days between the initial violation on October 30, 1967 and the last recorded violation on December 30, 1968. Premature pre-sunrise operation occurred over 3% of the specified period.

Operation With Presunrise Power After Sunrise

3. The second category concerns the operation of Station WCKD with pre-sunrise power after sunrise. This category cannot be tied down as precisely as the first category because operating log entries do not always show when WCKD changed from pre-sunrise to daytime operation. In those instances where not definitely shown, the period over which the infractions took place can only be estimated as any part of an interval between the last pre-sunrise log entry and the first daytime log entry. Forty-six infractions of over five minutes were involved, representing about 10 percent of the total number of days during the period in question. Where the time segment was definitely established, one infraction covered as much as 3 hours and 55 minutes to 4 hours and 35 minutes; another, 2 hours and 22 minutes, and 21 ranged from 13 minutes to 28 minutes. In those instances where the time element fell within a bracket, 14 infractions occurred anywhere from 10 to 55 minutes, and 9 occurred from time of observation to possibly as much as 30 minutes.

Operation With Daytime Power Before Sunrise

4. The third category involves the operation of WCKD with daytime power before sunrise. Apart from nonbracketed violations of 5 minutes or less on 37 days, 134 infractions of longer duration were involved, representing approximately 29 percent of the total number of days in question. Where the time segment was clearly established, one infraction covered 1 hour and 33 minutes, three covered 1 hour and 17 minutes, 26 ranged from 1 hour to 1 hour and 5 minutes, 27 ranged from 30 minutes to 60 minutes, and 46 ranged from 5 minutes to 30 minutes. Thirty-one infractions occurred anywhere from 5 minutes to 60 minutes.

Operation Past Sunset

5. The fourth category involves the operation of WCKD past sunset specified in the station's license on 160 different days representing 35% of the days involved during the period in question. The station signed off late as much as 1 hour and 15 minutes on 2 days, 1 hour and 5 minutes on 1 day, 1 hour on 146 days, 45 minutes on 5 days, and 30 minutes on 6 days.

6. Canyon's request for waiver of the Rules to permit WCKD to sign off one hour after sunset specified in its license was denied by the Commission on January 19, 1968. However, WCKD continued to sign off after sunset 72 times after its receipt [33] or about 21 percent of the 341 days in the balance of the period through December 1968. Of the 73 days, one involved a period of 1 hour and 15 minutes, another 1 hour and 5 minutes, 59 days involved 60 minutes, 5 days involved 45 minutes, and 6 days involved 30 minutes.

7. The controversy as to whether the Ishpeming area was in the Central standard time zone or the Eastern standard time zone extended over the period in question when WCKD signed on and signed off early or late. WCKD's operating logs from October 1967 through December 1968 were kept in Central daylight time from the last Sunday in April 1968 to the last Sunday in October 1968, and in Central standard time for the remainder of the period. Messrs. Blotter and Wesley J. Larson, the latter being the chief engineer at WCKD, never discussed sign-off procedures with each other. Mr. Blotter did not realize that the station had not adhered to its licensed sign-on and sign-off times.

8. Canyon attempted to use sunrise times as specified in a publication issued by the U.S. Naval Observatory for the nearby community of Marquette, Michigan. However, the record demonstrated that, on the basis of 82 operating log entries showing power change from 500 watts to 5,000 watts, 56 percent of the time the sign-on time of WCKD deviated more than 5 minutes from Naval Observatory time but was within 5 minutes 44 percent of the time. Thus, on numerous occasions, Canyon deviated significantly in signing on WCKD even by Naval Observatory time.

Excessive Pre-sunrise and Daytime Power

9. The fifth and sixth categories involves the operation of WCKD with pre-sunrise power and daytime power in excess of 5 percent specified in Section 73.52(a) of the Rules. WCKD's operating logs disclose that the station operated with excessive pre-sunrise power for a total of 27 days and with excessive daytime power for a total of 32 days, representing 6 percent and 7 percent, respectively, of the total of 457 days involved over the period in question. The time span involved on any specific day for pre-sunrise overpower varied anywhere from 17 minutes to 1 hour and 34 minutes on 19 days where the length of time could be definitely ascertained from log entries, and any part of the interval from the time of observation to possibly as much as 34 minutes on 8 other days where the length of time could not be definitely estab-

[33] WCKD received the letter about January 26, 1968.

lished but was bracketed from the last pre-sunrise to the first daytime log entries. The duration of excessive daytime power varied from 30 minutes to 6 hours and 30 minutes and possibly to 7 hours and 31 minutes on 25 days where definitely established from operating log entries and any part of the interval from the time of observation to as much as 1 hour on 7 days where the length of time could not be definitely established. Station WCKD failed to log time when it began to supply power to the antenna on 80 days.[34] This omission was a violation of Section 73.113(a)(1) of the Rules.

ASSESSMENT OF VIOLATIONS

10. As has been found, WCKD frequently began premature pre-sunrise operation for periods involving five minutes or less. There were other violations in this category of more than five minutes duration which were sporadic and did not extend beyond 30 minutes in any instance. The premature commencement of broadcasting, whether for short or long periods, cannot be reasonably justified since the applicable starting time was specified as 6:00 AM local standard time (CST) through March 1968, 6:00 AM local time (CDT) through October 28, 1968, and 6:00 AM local time (CST) thereafter. While split-second timing of the start of operation of a station may not be feasible due to warm-up and other considerations, nevertheless the deviations from prescribed starting times found in this case can only be attributed to negligence. The fact that only one employee was on duty in the early morning hours with several tasks to perform did not excuse the station from punctuality in adhering to the authorized times for its going on the air.

11. The record reflects that Station WCKD, in the period between October 1, 1967 and December 31, 1968, operated with pre-sunrise power after sunrise for about 10% of the total days involved insofar as infractions of more than five minutes a day were involved. Operation of the station with less than required power after sunrise finds no justification in the record and this warrants condemnation as evidencing carelessness with regard to the proper operation of the station.

12. With even greater frequency, Station WCKD operated with daytime power before sunrise. For the period in question, this type of infraction for more than five minutes each day occurred about 29% of the total number of days concerned. The authorized power of WCKD for pre-sunrise operation was 500 watts. WCKD's chief radio operator modified the transmitter from 5,000 watts to 500 watts initially by changing the power output of the transmitter from 5,000 watts to 1,000 watts by means of a switching arrangement designed by the manufacturer and then detuning the antenna loading inductance to bring the power down further until the antenna ammeter indicated about 4 amperes corresponding to approximately 500 watts. No change was made in the electrical constants or circuitry using a kit recommended by the manufacturer. However, an appropriate modification similar to the kit was later made. The former method

[34] This violation is actually distinct from the rest but since it is related to the first category (i.e., premature pre-sunrise operation), it is discussed therein in the findings.

of modifying a transmitter is unorthodox, unauthorized and unacceptable. It may have been the prime factor accounting for the frequent overpower operation of the station. Another factor that may account for excessive pre-sunrise operation of the station stems from a defective antenna ammeter. The indicating needle on the meter at times stopped at 6 amperes on the scale instead of returning to zero after the station signed off at the end of its daytime operation, when normally the antenna current was about 13 amperes. If the radio operator who resumed the pre-sunrise operation did not notice this phenomenon, the indicated antenna current would be 6 amperes instead of about 4 amperes normal for pre-sunrise operation. The cost of the meter is between ten to fifteen dollars but it was not replaced. WCKD's operating log for February 28, 1970, shows the station was still continuing to operate with excessive pre-sunrise power since entries in the log showed antenna current of 6 amperes and 6.1 amperes corresponding to radiated power of about 1,026 watts. Another reason advanced by WCKD's chief radio operator for overpower operation of the station was that the radio operators were perhaps reading the antenna current on modulation peaks. However, the Commission must rely on a station's records as the best evidence of the manner of its operation. The recording of the data of station operation is the obligation of the licensee, and this duty may not be avoided by resort to speculation and disavowal by the licensee of the accuracy of its own records. Moreover, the failure to utilize proper equipment, or to replace defective equipment, or to see that equipment is properly utilized by operators where, as here, the claim is made that the operators were negligent and inaccurate in adjusting a knob for pre-sunrise power, all these merit disapproval as constituting a "sloppy operation", to use the chief engineer's own terminology.

13. As previously mentioned, during the 15-month period involved, WCKD operated beyond its licensed sign-off time on 35% of the days in the 15-month period under consideration. The excessive periods of operation varied from 30 minutes to an hour and 15 minutes. While Frank Blotter attributed the late sign-offs to the confusion prevalent in the area with regard to the applicable time zone, it is clear that he was aware of the proper time to be observed according to the station's license and the time officially deemed applicable by the Department of Transportation and Federal Law. First, Blotter's erroneous assumption that he could sign-off late pending approval of this request to the Commission to do so is difficult to understand. Moreover, the very fact that he did operate under that assumption contravenes his contention that there was any confusion regarding the proper time to be observed. In addition, his testimony indicates that he deemed it best to operate according to the local time preferred by many, if not possibly a majority, of the Ishpeming community. Furthermore, the continued violations for five days after Blotter received the Commission's letter denying his request for waiver indicates laxity on his part. Blotter attributed these late sign-offs to a change in office personnel. But this circumstance called for increased vigilance on his part to see that the proper sign-off time was actually being followed by the new employee in making up the program logs

for the five days in question. Late sign-offs of 30 minutes are unexplained. With regard to the late sign-off during November and December 1968, it is significant to note that if the station had signed off one hour late through confusion there should have been corresponding late sign-ons of one hour. With respect to the late sign-offs, Blotter testified that the decision to sign off late was probably a joint decision between himself and Larson, though Larson recalled no such discussion. Larson, although agreeing it was part of his responsibility to consider the sign-off procedures of the station, also testified he assumed that the office staff took care of it. He subsequently testified it was the owner's responsibility to check program logs with the license. It is obvious that neither Larson nor Blotter reviewed them closely. In any event, to rely on the office personnel to determine proper sign-off time by following old program logs was an abdication of managerial responsibility for that function. That the station signed off late over 70 times after receipt of denial of a waiver request for late sign-off authorization, and that Blotter was not aware of these events, point to the absence of exercise of proper control by him over the station's operation.

14. It has been found that during the 15-month period involved, WCKD operated with pre-sunrise power and daytime power in excess of five percent of its licensed power, in violation of Section 73.52 (a) of the Rules. The frequency of violation represented 6% and 7%, respectively, of the total 457 days of operation. The pre-sunrise infractions are attributable to the utilization of makeshift equipment and objectionable operational procedures, and the daytime excessive power violations can be accounted for only by heedlessness. So, too, the failure on 80 days to record the time when the station began to supply power to the antenna shows a similar degree of inattention to complying with the requirements for proper operation of the station on the technical side. It must be noted that the logging omissions in each instance were violations of Section 73.113(a)(1) of the Rules.

15. The record does not reflect any complaints of actual interference occasioned to other radio stations on account of the various operational violations discussed above. Nor does this case involve any complaint against the programming carried by the station. Nevertheless, the many violations of the Commission's Rules committed by Station WCKD cannot be lightly dismissed. Premature pre-sunrise operation, operation with excessive pre-sunrise and daytime power, and operation beyond authorized daytime hours—all these infringe upon the protection afforded to other radio stations and carry the potential for interference with the broadcasts of other stations.

16. Nor can the violations by WCKD be condoned on the grounds of financial hardship and limited personnel. For it is the obligation of a station licensee to observe the Commission's Rules notwithstanding the particular economic problems experienced by an owner. Otherwise, the protection afforded to both other stations and the listening public by the applicable rules would depend upon the inclination and whim of any station owner who sees fit to operate his facility according to his personal situation, and chaos would ensue.

17. It is true that Frank Blotter was dependent upon his chief engineer with regard to the technical aspects of station operation. Nevertheless, premature pre-sunrise operation and failure to observe licensed sign-off times are not matters which fall within the exclusive technical competency of an engineer. Accordingly, Mr. Blotter could be expected to be knowledgeable at least about these areas of station operation. Moreover, he had to be aware of the need to use proper equipment for reduction of power for pre-sunrise operation after receiving a Commission telegram referring to the use of a "kit furnished by transmitter manufacturer to reduce transmitter output power". It is not an exaggeration to say that the many violations which characterized the operation of WCKD could not have taken place if Mr. Blotter had properly discharged his responsibility as the holder of a one-quarter interest in the licensee and the only stockholder who was actively engaged in the daily operation of the station. The continuing violations were deliberate on his part insofar as initial operation beyond licensed hours were concerned and were the consequence of inattention and lack of adequate supervisory control as far as the remaining violations were concerned. The Examiner concludes that Mr. Blotter's "extreme carelessness", to use the Broadcast Bureau's phrase, led to conditions at the station which made inevitable many, if not all of the violations which happened.

18. DuPage has propounded a comprehensive and detailed plan for the technical operation of its proposed Elmhurst station. It has selected a well qualified and very experienced first-class engineer to supervise and implement its operational and logging proposals. Although the organization of the Elmhurst proposal represents an attempt to avoid the recurrence of the derelections at WCKD, the poor history of the technical and other aspects of the station's operation under the management of Mr. Blotter as developed in the hearing after remand has engendered little confidence that the Elmhurst proposal will be free from violations of the Commission's Rules. Granting that Elmhurst should provide a more advantageous economic base for the proposed station's operation, that there should be no occasion for confusion as to applicable time zone, and the pre-sunrise operation should not be complicated by the equipment modification problems which obtained at WCKD, still these considerations are more than counterbalanced by the notable lack of responsible and competent managerial supervision by Blotter which attended his operation of the small station at Ishpeming. Particularly glaring is his lack of apprehension and his misconstruction of Commission communications and policy. Although Lois Blotter's recommendations from her present employer and her employment record are impressive, she has had no experience in the broadcast field and she cannot be expected to fulfill the managerial duties of Frank Blotter's job, in addition to her own responsibilities under the Elmhurst proposal. In evaluating the prospects for a trouble-free operation at Elmhurst, the violation-ridden track record of Mr. Blotter at WCKD makes it impossible to predict a violation-free operation at Elmhurst dissimilar from that at Ishpeming. There is nothing in the record to indicate that Frank Blotter's declarations to review station's logs, and to assume

primary responsibility for the station's operations, are anything more than self-serving statements and, consequently should not be relied upon in making a determination on the remand issues. Therefore, it is concluded that DuPage County Broadcasting, Inc., of which Mr. Blotter is the principal stockholder, cannot reasonably be expected to exercise diligently that degree of licensee responsibility required of the operator of a broadcast facility. It follows also that the public interest would not be served by permitting Mr. Blotter to acquire an interest in a broadcast authorization for an Elmhurst station, nor would it be served by a grant of the DuPage County Broadcasting, Inc. application. The foregoing conclusions require vacating the grant of a construction permit to DuPage which was proposed in the Initial Decision and the denial of its application for an Elmhurst station.

19. The Commission, in remanding this proceeding for further hearing, indicated its belief, that, in event of denial of the DuPage application for an Elmhurst station, the overall public interest would be better served by an award to Central or the denial of both applications. Moreover, it left for determination by the Examiner what disposition of this proceeding under these alternatives would best serve the public interest.

20. Central possesses the basic qualifications (legal, financial and technical) to become a licensee. If its application did not conflict with that of DuPage, there would be no obstacle to a grant thereof. As found in the Initial Decision, the Central proposal would provide a first local AM station to Wheaton, Illinois, which has a population of 30,910 persons, according to preliminary 1970 U.S. Census data. Wheaton is the County Seat of DuPage County, in which Elmhurst is also located, and is centrally located in the county. Central's proposed station would completely encompass the proposed service area of DuPage, would provide a 5 mv/m signal to Elmhurst, and would serve some 15,579 persons within DuPage County who would not be served by the Elmhurst station proposal. The service area of Central would extend further to the west from Chicago than the Elmhurst proposal. There is a presumptive need for the service from a first Wheaton AM station since the community has its own local government, customary local municipal services, and its own civic and commercial service organizations and clubs, as well as schools and churches. Based on the foregoing considerations, it is concluded that the public interest would well be served by a grant of Central's application in the absence of a grant to DuPage,[35] and that the denial of the Central application in the Initial Decision should be vacated.

In view of the foregoing, IT IS ORDERED, That, unless an appeal to the Commission from this Supplemental Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on

[35] In the Initial Decision, the Examiner concluded that Central's proposal would be preferred under the contingent standard comparative issue although Section 307(b) factors were found to favor the DuPage proposal.

its own motion in accordance with the provisions of Section 1.276 of the Rules:

(a) The conclusion in the Initial Decision that the public interest would be better served by a grant of the DuPage application, with the application of Central being denied, IS VACATED;

(b) The application of Howard L. Enstrom and Stanley G. Enstrom, d/b as Central DuPage County Broadcasting Company, for a new Class II standard broadcast station at Wheaton, Illinois, to operate on 1530 kHz, daytime only, with a power of 500 watts, utilizing a directional antenna system, IS GRANTED, subject to the following condition:

"Any pre-sunrise operation must conform with Sections 73.87 and 73.99 of the Rules, as amended June 28, 1967 (32 FR 10437), supplementary proceedings (if any) involving Docket No. 14419, and/or the final resolution of matters at issue in Docket No. 17562."

(c) The application of DuPage County Broadcasting, Inc., for a new Class II standard broadcast station to operate on 1530 kHz, daytime only, with a power of 250 watts, utilizing a directional antenna system, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
ISADORE A. HONIG, *Hearing Examiner.*

F.C.C. 73-238

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 74 AND 78 OF THE COMMISSION'S RULES AND REGULATIONS AS CONCERNS APPLICATIONS FOR CHANGES IN HEIGHT OR DIRECTION OF AN ANTENNA, AND OTHER RESPECTS	Docket No. 19582

REPORT AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION:

1. By Notice of Proposed Rule Making, adopted August 29, 1972 (37 F.R. 18569), the Commission proposed amendment to Sections 74.451; 74.551(a); 74.651(a); 74.751(b); 74.851(a); 74.951(a); and 78.109(a) of the Commission's Rules and Regulations, relating to remote pickup, aural STL and intercity relay, television auxiliary, television translator, television booster, Instructional Television Fixed Service, and cable television relay services, and more particularly the requirements for filing applications for changes in facilities where possible airspace problems are presented.

2. The Notice pointed out that one of the purposes of the rule making was that any application for change of antenna height for the various services covered by Part 74 and Section 78.109 of the Rules be coextensive with the requirements of Part 17 unless other requirements are deemed necessary. In the latter respect, we also proposed changes in provisions concerning the application-filing requirements where a horizontal change in antenna location is involved to bring the provisions of the Rules into harmony with Part 17. Editorial changes were also proposed for internal consistency with other rules.

3. These proposals were made by the Commission *sua sponte*. No one has filed comments either in favor of or opposing the proposed change. We would suppose that the absence of comments more or less reflects agreement with the proposals. In the circumstances, an extended discussion is unnecessary, inasmuch as it is quite clear that the proposals are deemed meritorious. With the exception of Section 74.451, these Rules are being adopted as proposed, and that one is being adopted in a form consistent with the other rule changes.

4. Accordingly, under the authority of Sections 4(i) and (j) and Section 303(r) of the Communications Act of 1934, as amended, Part

74 and Section 78.109(a) IS AMENDED as set forth in the attached appendix. These amendments shall go into effect April 16, 1973.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. Section 74.451 is amended to read as follows:

§ 74.451 *Equipment changes.*

(a) Prior Commission approval is required for any change in the overall height of the antenna structure except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

(b) The licensee of a remote pickup broadcast station may make any other changes in the equipment that are deemed desirable or necessary provided:

(1) That the operating frequency is not permitted to deviate more than the allowed tolerance;

(2) That the emissions are not permitted outside the authorized band;

(3) That the power output complies with the license and the regulations governing the same; and

(4) That the transmitter as a whole or output power rating of the transmitter is not changed.

(c) Other equipment changes not specifically referred to in this section may be made at the discretion of the licensee: *Provided,* That the Engineer in Charge of the radio district in which the station is located and the Commission in Washington, D.C. are promptly notified in writing upon the completion of such changes, and further that the changes are set forth in the next application for renewal of license.

2. In Section 74.551(a), subparagraph 4 is amended to read as follows:

§ 74.551 *Equipment changes.*

(a) * * *

(4) Any change in the overall height of the antenna structure, except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

* * * * * * *

3. In Section 74.651(a), subparagraph (4) is amended and subparagraph (5) is added to read as follows:

§ 74.651 *Equipment changes.*

(a) * * *

(4) Any change in the overall height of the antenna structure, except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

(5) Any change in the direction of the main radiation lobe of the transmitting antenna.

* * * * * * *

4. In Section 74.751(b), subparagraphs (3) and (5) are amended to read as follows:

§ 74.751 *Equipment changes.*

* * * * * * *

(b) * * *

(3) Any change in the overall height of the antenna structure, except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

* * * * * * *

(5) Any horizontal change in the location of the antenna structure which would (i) be in excess of 500 feet, or (ii) require notice to the Federal Aviation Administration pursuant to § 17.7 of this chapter.

* * * * * * *

5. In Section 74.851(a), subparagraphs (3), (5), (6), and (7) are amended and (8) is added to read as follows:

§ 74.851 *Equipment changes.*

(a) * * *

(3) Any change in the overall height of the antenna structure, except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

* * * * * * *

(5) Any change in the location of the transmitter except a move within the same building or upon the same tower or pole.

(6) Any horizontal change in the location of the antenna structure which would (i) be in excess of 500 feet, or (ii) require notice to the Federal Aviation Administration pursuant to § 17.7 of this chapter.

(7) A change of frequency assignment.

(8) A change of authorized operating power.

* * * * * * *

6. In Section 74.951(a), subparagraphs (3), (4), (5), (6), and (7) are amended and (8) is added to read as follows:

§ 74.951 *Equipment changes.*

(a) * * *

(3) Any change in the overall height of the antenna structure, except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

(4) Any horizontal change in the location of the antenna structure which would (i) be in excess of 500 feet, or (ii) require notice to the Federal Aviation Administration pursuant to § 17.7 of this chapter.

(5) Any change in the transmitter control system.

(6) Any change in the location of the transmitter except a move within the same building or upon the same tower or pole.

(7) A change of frequency assignment.

(8) A change of authorized operating power.

* * * * * * *

7. In Section 78.109(a), subparagraphs (3), (4), (5), (6), and (7) are amended and subparagraph (8) is added to read as follows:

§ 78.109 *Equipment changes.*

(a) * * *

(3) Any change in the overall height of the antenna system except where notice to the Federal Aviation Administration is specifically not required under § 17.14(b) of this chapter.

(4) Any horizontal change in the location of the antenna (other than a CAR pickup station transmitter).

(5) Any change in the transmitter control system.

(6) Any change in the location of a station transmitter (other than a CAR pickup station transmitter), except a move within the same building or upon the tower or mast or a change in the area of operation of a CAR pickup station.

(7) Any change in frequency assignment.

(8) Any change in authorized operating power.

* * * * * * *

F.C.C. 73-206

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REQUEST, FOR ISSUANCE OF TAX CERTIFICATE FOR SALE OF INTEREST IN A CABLE TELEVISION SYSTEM PURSUANT TO SECTION 76.501(a)(2) OF THE COMMISSION'S RULES, BY FISHER'S BLEND STATION, INC. Re Cable Television Systems, Serving the Seattle, Wash., Area	File No. CTAX-12

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released February 28, 1973)

BY THE COMMISSION:

1. In our *Second Report and Order in Docket No. 18397*, 23 FCC 2d 816, we adopted Section 76.501 (originally designated Section 74.1131) of the Commission's Rules, which, inter alia, prohibits cross ownership, operation, control, or interest of a cable television system with a local television broadcast station, and requires divestiture where necessary to eliminate such existing proscribed cross-relationships.[1] In paragraph 16 of that report and order we noted that such divestitures can be effected without payment of capital gains tax if the "involuntary conversion" provisions of the Internal Revenue Code are applicable.[2] On January 26, 1972, in *Cosmos Cablevision Corporation*, 33 FCC 2d 293, we granted the first two tax certificate applications pursuant to our new cable television cross-ownership rules.

2. Now before it is an application for a Section 1071 tax certificate, filed in August 1972 by Fisher's Blend Station, Inc. ("Fisher"), licensee of Station KOMO-TV, Seattle, Washington, with respect to Fisher's transfer of its stockholdings in United Community Antenna System, Inc. ("UCAS"), to Viacom International, Inc. ("Viacom").

3. In support of its application, Fisher states the following: (a) Fisher and its predecessor, Fisher Television Company, have held the license of KOMO-TV since 1953. (b) Prior to December 27, 1966,

[1] Section 76.501 provides, in pertinent part: "(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: . . . (2) a television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers . . ."

[2] Section 1071 of the 1954 Internal Revenue Code provides that, "If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy or the adoption of a new policy by the [Federal Communications] Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the stockholder so elected, be treated as an involuntary conversion of such property within the meaning of section 1033."

Fisher, King Videocable Company, and KIRO, Inc., each held a one-third interest in UCAS. King Videocable was cross-owned with Station KING–TV, Seattle; KIRO, Inc., was the licensee of Station KIRO–TV, Seattle. (c) On December 27, 1966, UCAS bought the assets of Master Television Antenna System, Inc. ("Master"), operator of a cable television system within the city limits of Seattle. As a result of that transaction, the interests of UCAS's stockholders were changed to: Fisher, 24%; King Videocable, 24%; KIRO, Inc., 24%; and Tele-Vue Systems, Inc., 28%. (d) On April 30, 1969, UCAS bought all of the outstanding shares of Vista Television Cable, Inc. ("Vista"), operator of a cable system outside of the city limits of Seattle (on the east side of Lake Washington, from the Lake Samanish area to the Bothell area). (e) Both the Master system and the Vista system are within the predicted Grade B contour of Fisher's Station KOMO–TV. (f) In compliance with the divestiture requirements of Section 76.501 (originally Section 74.1131), Fisher (along with King Videocable and KIRO, Inc.) on March 29, 1972, agreed to sell and did sell its interest in UCAS to Viacom International, Inc. ("Viacom"), a company in which Fisher has no stock interest. (g) In July 1972, the Commission approved the issuance of a tax certificate to King Videocable with respect to the same divestiture transaction; the same circumstances justifying a tax certificate in that case [3] apply in the present matter also.

4. The impact of Section 76.501 is that, if a cable television system which has a cross-interest relationship with a co-located television broadcast station proposes to carry the signal of any television station (i.e., perform a key function by which the term "cable television system" is defined), there must be a divestiture of the interest in either the cable television system or the television broadcast station. Thus, a divestiture of the interest in either the system or the station, in compliance with the requirements of Section 76.501, is clearly "necessary or appropriate" to effectuate a new policy by the Commission with respect to ownership and control of television stations and cable television systems.

5. In view of the foregoing, including Fisher's assertions of fact as set forth in paragraph 3 supra, we find that the sale by Fisher's Blend Station, Inc., of its above-described interest in UCAS's Seattle, Washington, area cable television systems was necessary or appropriate to effectuation of the new policy adopted by the Commission and reflected in Section 76.501 of our Rules, with respect to the ownership and control of television stations and cable television systems.

Accordingly, IT IS ORDERED, That there BE ISSUED to Fisher's Blend Station, Inc., the tax certificate appended hereto, certifying that its sale of its interest in the above-referenced cable

[3] *King Videocable Company*, 25 FCC 2d 583. In November 1972, KIRO, Inc. was also issued a tax certificate with respect to that transaction (*KIRO, Inc.*, 37 FCC 2d 1034).

television systems was necessary or appropriate to effectuation of the new policy adopted by the Commission with respect to the ownership and control of television stations and cable television systems.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

Fisher's Blend Station, Inc., licensee of Station KOMO–TV, Seattle, Washington, has reported to the Commission its sale on March 29, 1972, of its interest in United Community Antenna Systems, Inc., operator of a cable television system in Seattle, Washington, and sole owner of Vista TV Cable, Inc., operator of a cable television system at the east side of Lake Washington, from the Lake Samanish area to the Botheel area in King County, Washington, to effectuate compliance with Section 76.501 of the Commission's Rules with respect to ownership and control of cable television systems and television broadcast stations.

It is hereby certified that the sale of Fisher's Blend Station, Inc.'s interest in these cable systems was necessary or appropriate to effectuate the Commission's new rule and policy prohibiting cross ownership, operation, control, or interest of a cable television system with a local television broadcast station, and, in particular, to effectuate compliance with the provisions of Section 76.501 (originally designated 74.1131) of the Commission's Rules, adopted June 24, 1970, and released July 1, 1970, in the *Second Report and Order in Docket No. 18397*, 23 FCC 2d 816.

This certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof, I have hereunto set my hand this 21st day of February, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109-030—73——5

F.C.C. 73-241

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re FLAGLER CABLE CO., INC., FLAGLER BEACH, FLA. For Certificate of Compliance	CAC-1594 FL254

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT

1. On November 13, 1972, Flagler Cable Company, Inc. filed the above-captioned application for a certificate of compliance to offer cable television service at Flagler Beach, Florida, a small community of approximately 950 persons in the Orlando-Daytona Beach, Florida, television market (#55). The following Florida television broadcast signals are proposed for carriage: WESH-TV (NBC), Daytona Beach; WDBO-TV (CBS), WFTV (ABC), Orlando; WJXT (CBS), WJCT (Educ.), Jacksonville. Rust Craft Broadcasting Company, licensee of Station WJKS-TV (ABC), Jacksonville, and ITT Community Development Corporation, a real estate developer in the area, opposed the application, and Flagler Cable has replied.

2. Rust Craft objects to the application on the grounds: (a) that Flagler Cable's franchise may be invalid; and (b) that it would be unfair for WJXT to be carried if WJKS-TV is not. The franchise is claimed to be invalid since it requires the first five channels to be carried on the cable system be VHF only: WJKS would not qualify for carriage as it is a UHF station. Because signal carriage matters are exclusively within the jurisdiction of the Federal Communications Commission, Rust Craft asserts the franchise "goes beyond the pale." Rust Craft objects to the proposal to carry WJXT and not WJKS-TV on the ground that both stations place predicted Grade B contours over Flagler Beach. Rust Craft argues further that WJKS-TV faces strong local competition from WJXT and other Jacksonville stations, so that any competitive advantage afforded WJXT will work to the certain disadvantage of WJKS-TV.

3. ITT Community Development Corporation (ICDC) holds large tracts of land in Flagler County which it intends to develop as a residential community. Its stated concern is for "all aspects of community life and facilities in the area" including cable television. ICDC asserts that Flagler Cable's franchise (adopted March 9, 1972) does not comply with the requirements of Section 76.31 of the Commission's Rules. Although the franchise antedates the effective date of the new cable television rules, ICDC contends that it should nonetheless be

judged against their provisions because of the wide notoriety of these rules upon their adoption in February, 1972—an argument we deem to be irrelevant. ICDC lists the following franchise deficiencies: (a) there is no showing that it was awarded pursuant to a public proceeding; (b) it does not require that a significant amount of construction be accomplished within one year of Commission certification; (c) the initial term is 20 years, which is in excess of the Commission's 15-year limit; (d) it permits Flagler Cable to raise its subscriber rates without a public hearing; (e) no provision is made for the resolution of subscriber complaints nor the establishment of a local business office; (f) there is no provision for the incorporation in the franchise of any future changes in Section 76.31 of the Rules.

4. In reply to Rust Craft, Flagler Cable argues that its franchise has been misconstrued. The franchise requires only that the first five television signals carried—whether UHF or VHF in origin—be transmitted to subscribers as VHF channels. And as for the theory that WJKS–TV should be carried if WJKX is available to its subscribers, Flagler Cable states that it will be willing to provide WJKS–TV's signal if the Commission's rules authorized such carriage. Since WJKS–TV is not significantly viewed in Flagler County, only a waiver of Section 76.63 of the Rules—the applicable signal carriage rules—can permit its carriage. Neither Rust Craft nor Flagler Beach has requested a waiver of Section 76.63, and it would be premature for us to rule upon such a matter before an appropriate request has been made and comments thereon have been received. On the basis of what has been submitted, we find Flagler Beach's response to be a persuasive rejoinder to Rust Craft's opposition to its application.

5. The record does not indicate that—in fact—either Flagler Cable or the City of Flagler Beach knew the provisions of our proposed rules when they agreed to the franchise. The other contentions of ICDC were answered by Flagler Cable as follows: (a) a public proceeding attended the award of the franchise, and minutes of the City Commission's meeting are submitted as corroboration; (b) while the franchise only requires "prompt" construction, the applicant avers the system will be operating within one year and completely installed in three years; (c) the initial franchise duration of 20 years was not *per se* illegal until the *Reconsideration of The Cable Television Report and Order* was adopted several months after the franchise's award; (d) while the franchise does not specify that subscriber rates can only be increased after a public hearing, all rates must be reasonable or the cable system will be subject to penalties imposed in a public hearing; (e) the franchise requires the system to be operated in accordance with the Commission's rules, which includes establishment of a local office to act on subscriber complaints; and (f) the franchise requires all applicable regulations of the Commission to be adhered to, which appears to satisfy the requirement that all new rules be incorporated into the franchise within one year. Under the circumstances described above, we are satisfied that there has been substantial compliance with our franchise requirements and that a certificate of compliance should be issued until March 31, 1977. *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application (CAC–1594) for a certificate of compliance filed by Flagler Cable Company, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Objection of Rust Craft Boardcasting Company, WJKS–TV, Jacksonville, Florida", filed January 3, 1973, IS DENIED.

IT IS FUTHER ORDERED, That the "Comments of ITT Community Development Corporation" filed January 3, 1973, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-239

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (UNION SPRINGS AND TALLASSEE, ALA.)	Docket No. 19628 RM-1902, RM-2040

FIRST REPORT AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION:

1. The Commission has before it the Notice of Proposed Rule Making released November 13, 1972 (37 Fed. Reg. 24369) proposing an amendment of Section 73.202(b) of the Rules, the FM Table of Assignments. The rule making was instituted on the basis of two petitions for assignment of the same FM channel to neighboring communities resulting in a channel conflict. The petition filed by Ne-Ler Company, licensee of Station WTLA, Tallassee, Alabama, proposed assignment of Channel 240A to Tallassee, Alabama. The petition filed by Union Springs Broadcasting Company (Union Springs) proposed the assignment of Channel 240A to Union Springs, Alabama. This Report and Order concerns only the petition for the assignment at Union Springs, RM-1902. At a later date a Report and Order will be issued on the remaining petition.

2. The Notice observed that since the distance between Tallassee and Union Springs is 28 miles, Channel 240A cannot be assigned to each of the two communities (required spacing is 65 miles). To resolve the conflict we proposed to assign Channel 240A to Tallassee and Channel 265A to Union Springs, provided that the transmitter site of a Union Springs station is located at least 4 miles southwest of the community in order to meet the spacing requirement with respect to Station WCJM at West Point, Georgia, operating on Channel 265A. A counterproposal timely filed in this proceeding by All Channel TV Service, Inc., proposes to assign Channel 240A to Tuskegee, Alabama, rather than to Tallassee.

3. On January 15, 1973, Union Springs Broadcasting Company filed a Motion to Sever and Request for Immediate Allocation of Channel 265A to Union Springs stating that the only remaining conflict in this proceeding is that between the proposals to assign Channel 240A to Tallassee or Tuskegee, and that Channel 265A can be assigned to Union Springs without regard to either Tallassee or Tuskegee. The motion further states that although Channel 265A at Union Springs can meet spacing requirements with regard to Station WCJM, West Point, Georgia, if located at either Tallassee or Tuskegee, it cannot. In view

of this, it states, it is appropriate for the Commission to severe the Union Springs proposal and make the assignment immediately. We believe it would be in the public interest to sever the proposal for Union Springs, Alabama, and grant the assignment of Channel 265A to that community since Channel 265A cannot be used at either Tallassee or Tuskegee.

4. A supporting comment was filed by Union Springs Broadcasting Company, stating its acceptance of the suggested proposed Channel 265A and reiterated its intent to apply for the channel, if assigned, and to construct a station promptly, if authorized. There were no opposing comments. As indicated in paragraph 2 above, this assignment can be made in conformance with the Commission's minimum mileage separation rule, providing the transmitter site is located at least 4 miles southwest of Union Springs. In the Notice of Proposed Rule Making we set out economic and other information pertaining to the need for a first FM assignment to Union Springs, Alabama. That information is accepted as being substantially correct and will not be repeated here, except to say that there are no aural or television facilities authorized or operating in Union Springs or Bullock County (populations 4,323 and 11,824, respectively). The assignment of Channel 265A would thus provide for a first local broadcast facility there.

5. The authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

6. Accordingly, IT IS ORDERED, that effective April 16, 1973, the Table of FM Assignments (Section 73.202(b) of the Rules) IS AMENDED with respect to the community listed below to read as follows:

City	*Channel No.*
Union Springs, Ala	265A.

7. IT IS FURTHER ORDERED, That the Motion to Sever and Request For Immediate Allocation of Channel 265A to Union Springs, Alabama, filed January 15, 1973, by Union Springs Broadcasting Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–205

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re GREATER LAWRENCE COMMUNITY ANTENNA, INC., LAWRENCE, MASS. For Certificate of Compliance	CAC–1002 MA056

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released March 1, 1973)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On August 9, 1972, Greater Lawrence Community Antenna, Inc., filed the above-captioned application for certificate of compliance to begin cable television service at Lawrence, Massachusetts, a community of 66,216 persons, located in the Boston-Cambridge-Worcester, Massachusetts television market (#4). The applicant proposes to carry the following television broadcast signals: WBZ–TV (NBC), WCVB–TV (ABC), WNAC–TV (CBS), WGBH–TV (Educ.), WGBX–TV (Educ.), WSBK–TV (Ind.), WQTV (C.P.), all Boston, Massachusetts; WKBG–TV (Ind.), Cambridge, Massachusetts; WSMW–TV (Ind.), Worcester, Massachusetts; WMUR–TV (ABC), WXPO–TV (C.P.), both Manchester, New Hampshire; WENH–TV (Educ.), Durham, New Hampshire; WCSH–TV (NBC), Portland, Maine; WJAR–TV (NBC), WPRI–TV (CBS), both Providence, Rhode Island. Greater Lawrence asserts the right to carry the above-listed signals pursuant to Section 76.65 of the Commission's Rules.[1]

2. On October 2, 1972, New Boston Television, Inc., licensee of Station WSBK–TV, Boston, Massachusetts, filed an opposition to this application.[2] New Boston objects to Greater Lawrence's application to the extent it proposes carriage of the out-of-market network signals of WCSH–TV, WJAR–TV, and WPRI–TV. New Boston claims that Greater Lawrence's proposed signals are not in fact "grandfathered" pursuant to Section 76.65 of the Rules. And, if these signals are not grandfathered, then carriage of WCSH–TV, WJAR–TV, and WPRI–TV is inconsistent with Section 76.61 of the Rules, and should not be permitted.[3] The basis of New Boston's position is that Greater Law-

[1] Section 76.65 of the Rules provides in pertinent part that: "The provision of §§ 76.67, 76.59, 76.61, and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972 * * *."

[2] On October 24, 1972, Greater Lawrence filed a "Reply to Opposition," and on October 30, 1972, New Boston filed a "Motion to Accept Additional Pleading" and a "Supplement to Opposition." These pleadings are considered below.

[3] Carriage of the other signals proposed by Greater Lawrence is consistent with Section 76.61 of the Rules.

rence's claim to grandfathered status is based on a notification filed pursuant to former Section 74.1105 of the Rules, which allegedly was not perfected before March 31, 1972, the effective date of the Commission's present cable television rules. Thus, it is argued that Greater Lawrence was not "*authorized* to carry . . . *prior* to March 31, 1972 (emphasis supplied)" its requested signals pursuant to Section 76.65 of the Rules.

3. The following circumstances led to this controversy. On February 22, 1972, Greater Lawrence tendered for filing a letter dated February 14, 1972, which was intended to serve as a Section 74.1105 notification of proposed service. The notification was technically deficient in two respects: first, Greater Lawrence had failed to furnish copies of the notifications sent to each party entitled to notification: and, second, Greater Lawrence failed to tender the filing fee required by Section 1.1102(a) of the Rules. On February 25, 1972, Greater Lawrence was notified that its notification could not be accepted for filing, because of the deficiencies noted above. On March 6, 1972, Greater Lawrence filed its notification in proper form and its notification of proposed service was accepted for filing. *Inter alia*, Greater Lawrence states that its notifications were sent to the appropriate parties February 14, 1972.

4. New Boston argues that former Section 74.1105(c)[4] of the Rules allowed 30 days after notification for objections to proposed service to be filed, and since Greater Lawrence's notification was not accepted for filing until March 6, 1972, it was impossible for this 30 day period to run since the new cable television rules became effective March 31, 1972. Thus, it claims that even though no objections were filed to the notification of proposed service, Greater Lawrence's proposed signals were not authorized prior to March 31, 1972. In its reply, Greater Lawrence argues that the 30 day period for objection to Section 74.1105 notifications ran from the date notice was given parties entitled to notice pursuant to Section 74.1105(a) of the Rules.[5]

5. We must reject New Boston's argument. The 30 day objection period of Section 74.1105 was intended to run from the date the notification was filed with the Commission. One of the functions of former Section 74.1105(a) of the Rules was to assure notice to interested parties, but it was also intended that copies be timely filed with the Commission to allow it to be aware of new proposals. Usually, the only date which the Commission could have relied on with certainty was the date on which Section 74.1105 notifications were filed. But in the present case, Greater Lawrence originally attempted to file its

[4] Former Section 74.1105(c) of the Rules provided, in part, that: "(c) Where a petition with respect to the proposed service is filed with the Commission * * * within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission s ruling on the petition or on the interlocutory question of temporary relief pending further procedures; . . . Where no petition * * * has been filed within thirty (30) days after notice, service may be commenced at any time thereafter * * *."

[5] Former Section 74.1105(a) of the Rules provided in pertinent part that: "No CATV system shall commence operations in a community * * * unless the system has given proper notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate * * * and has furnished a copy of each such notification to the Federal Communications Commission * * * no CATV shall commence such operations until thirty (30) days after notice has been given * * *."

Section 1105 notification February 22, 1972. The notification was returned to Greater Lawrence giving it 30 days to correct its deficiencies, which Greater Lawrence did. Under these circumstances, we believe it appropriate to accept the notification *nunc pro tunc* February 22, 1972, and thus its signals are grandfathered. Compare *Berwick* v. *Federal Communications Commission*, 109 U.S. App. D.C. 214, 286 F. 2d 97 (1960); also see *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949); *City Cabs, Inc.* v. *Federal Communications Commission*, 107 U.S. App. D.C. 136, 137, 275 F. 2d 165, 166 (1960). New Boston was given notification of proposed service long before the end of February 1972, a fact that New Boston does not deny. New Boston thus had ample opportunity to object to Greater Lawrence's proposed signals at that time, and now, many months later, to allow it to come in and object to the notification would be inequitable. Compare *West Valley Cablevision, Inc.*, 19 FCC 2d 431 (1969).

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application" filed by New Boston Television, Inc., on October 2, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–1002) for certificate of compliance IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-245

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
GARY LANE, ESQ., AGAINST NATIONAL BROADCASTING CO.

ORDER

(Adopted March 2, 1973; Released March 6, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it an Application for Review filed on December 6, 1972 by Gary Lane, Esquire, of the ruling of the Broadcast Bureau of November 10, 1972.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct. However, it should be noted that this routine fairness ruling points up a most important principle and merits some comment.

3. The complainant's concern here, based particularly on his differing viewpoint with respect to the SCAB's record and duties, is not a frivolous one. Without question, Mr. Brinkley's remarks presented a one-sided view concerning the SCAB. However, the commentary contained only one passing reference to the SCAB, the thrust of the commentary being focused on the personal history and retirement of Mr. Otepka. Cf. *Healey* v. *FCC*, 460 F. 2d 917 (CADC, 1972). In *National Broadcasting Co.*, 25 FCC 735, 736-37 (1970), quoted at length in the Bureau's ruling in this case, we set out the guiding principles as to the application of the fairness doctrine to passing references in news programs. Those principles undoubtedly result in less than perfect fairness being achieved. But the crucial consideration is whether, on balance, Governmental intervention to attempt to secure perfect fairness will serve the public interest. We have concluded that it will not. For, under the guise of enforcing the fairness doctrine we cannot become the national arbiter of the fairness or accuracy of every observation, statement or casual comment in the tens of thousands of newscasts by thousands of broadcast licensees. Such a course of pervasive and undue intervention into the journalistic process would serve neither the overriding goal of the First Amendment nor the public interest standard of the Communications Act.

4. Accordingly, pursuant to Section 1.115(i) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73–243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
MAHONING VALLEY CABLEVISION, INC., LIBERTY TOWNSHIP, OHIO	CAC–824, CSR–164, OH209
WEATHERSFIELD TOWNSHIP, OHIO	CAC–826, CSR–165, OH211
WARREN TOWNSHIP, OHIO	CAC–827, CSR–163, OH212
HOWLAND TOWNSHIP, OHIO	CAC–828, CSR–166, OH213
VIENNA TOWNSHIP, OHIO	CAC–833, CSR–168, OH215
CHAMPION TOWNSHIP, OHIO	CAC–834, CSR–167, OH216
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE CONCURRING AND ISSUING A STATEMENT.

1. On July 7, and 9, 1972, Mahoning Valley Cablevision, Inc., proposed operator of cable television systems in the above-captioned communities (located in the 79th television market) filed applications requesting certification for the following Ohio television signals: WFMJ–TV (NBC), WKBN–TV (CBS), WYTV (ABC), Youngstown; WUAB (Ind.) Lorain, and WKBF (Ind.), WVIZ–TV (Educ.), WKYC–TV (NBC), WEWS–TV (ABC), and WJW–TV (CBS), Cleveland, Ohio. Simultaneously, Mahoning filed petitions for Special Relief requesting partial waiver of Section 76.31 of the Commission's Rules.[1]

2. On August 21, 1972, Summit Radio Corporation, licensee of Station WAKR–TV (ABC), Akron, Ohio, advised the Commission that it had informed Mahoning that carriage of WAKR–TV is required on the proposed cable television systems at Warren Township and Champion Township pursuant to Section 76.61(a)(1) of the Rules because these communities are partially within WAKR–TV's 35-mile zone. WAKR–TV further stated that Mahoning agreed to carriage

[1] Opposition to the applications filed by the Trumbull County NAACP was withdrawn on January 3, 1973, following an agreement between Mahoning and the NAACP dealing primarily with minority employment.

of this station in Warren Township and Champion Township.[2] It appears that Warren and Champion Townships are within WAKR–TV's zone; therefore, we will permit Mahoning to carry WAKR–TV on its proposed cable television systems at Warren and Champion Townships.

3. Mahoning has filed for special relief because it contends that Ohio Townships cannot issue cable television franchises. In support of its contention, Mahoning furnishes a letter it received from Mr. J. Walter Dragelevich, Prosecuting Attorney of Trumbull County, Ohio, who acts as legal advisor to the above-captioned townships. Mr. Dragelevich's letter states in pertinent part, as follows:

> (I)t is our considered legal judgment that any company seeking to furnish cable television facilities to the townships within Trumbull County are (sic) free to do so without securing prior approval of the Township Trustees.

Accordingly, Mahoning requests special relief pursuant to Section 76.7 of the Commission's Rules to qualify under Par. 116, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), which provides for case by case consideration where it is claimed that there is no franchise or other appropriate authorization available for the cable operator to submit in an application for certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal for assuring that the substance of our rules, and specifically Section 76.31, is complied with.

4. In support of its request for special relief, Mahoning supplies a copy of the existing franchise for the City of Niles, Ohio, which contains provisions which meet most of the requirements of Section 76.31 of the Rules, and pledges that it will comply with all of the requirements of the Niles franchise and all appropriate Commission regulations. Specifically, in areas where the Niles franchise is not fully consistent with Section 76.31 of the Rules, Mahoning agrees to operate as follows: significant construction will be accomplished within one year after receiving Commission certification and a substantial percentage of the area will be energized each subsequent year until completion of the system in compliance with Rule 76.31(a)(2); initial subscribers rates will be in accordance with those set by the City of Niles, and any change in the Niles rates would have to be approved by the Niles City Council; and, pursuant to the Niles franchise, Mahoning will maintain an office in each of the townships to handle service complaints and will abide by all present and future regulations of this Commission. Although there is a 3% franchise fee for Niles, no such fee will be paid to any of the Townships involved.

5. It is appropriate to note that this is obviously a difficult area, and one which will require further consideration in our overall proceedings. We believe that we should not "freeze" cable development in localities where a supervising governmental entity is not now present, but rather should examine the applicant and its representations to determine whether on balance permission to proceed would serve the public interest. We have done so here, and find that a grant of these applications is appropriate. These grants are made subject to

[2] On February 6, 1973, Mahoning amended the Warren and Champion Township applications to specify carriage of WAKR–TV.

compliance with any further conditions imposed by the Commission during the period until March 31, 1977, which may result (i) from our overall proceedings to deal with this possible regulatory lacuna, or (ii) from further orders specifically directed to this case in event of facts being brought to our attention warranting action to protect the public interest. In any event, in 1977 we shall have the opportunity to review the matter, and may require special showings in these situations, if there has been no local regulatory change. Compare *Sun Valley Cable Communications*, FCC 73–27, — FCC 2d —.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications (CAC–824, 826–828, 833–834) filed by Mahoning Valley Cablevision, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

The certificate of compliance applications, filed by Armstrong Utilities, Inc. and Mahoning Valley Cablevision, Inc. for proposed cable television systems in various Ohio townships, raise the same issue as to the Commission's approach in those instances where there is no franchise or other appropriate authorization (see Rule 76.31) available for submission by a cable operator in a certificate of compliance application. In paragraph 116 of our *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), we indicated that the Commission would deal with such a situation on an *ad hoc* basis and that a cable operator would be required to include an acceptable alternative proposal in his certificate application, which would insure that the substance of our rules (and specifically, the franchise standards of Rule 76.31) is complied with. In paragraph 117 of the *Reconsideration Order*, we also stressed that proposed cable operations would not be delayed indefinitely until local jurisdictional disputes are settled.

Here, in the instant cases, both cable operators contend that Ohio townships have no authority to issue cable television franchises, and they support this claim with statements of local Ohio officials. They, therefore, request that their alternative proposals be accepted by the Commission pursuant to paragraph 116 of the *Reconsideration Order*. The Commission concludes that grant of the certificate applications is warranted under the circumstances so that cable development is not hindered in localities where a supervising governmental entity is not now present or the extent of its authority is in question.

While I have no quarrel with the adequacy of the cable operators' proposals in terms of our franchise standards and have concurred in grant of the certificate applications, I am concerned about the apparent absence of governmental franchising authority in Ohio communities other than municipalities. Our regulatory approach in the

Cable Television Report and Order, 36 FCC 2d 143 (1972), was deliberately based on a "structured dualism" whereby both federal and local authorities share responsibility for the effective implementation of cable television service. Local franchising was made an integral part of our program so that specific standards concerning such matters as rate charges and service complaints could be implemented by local authorities. In those states where no local authority exercises jurisdiction over cable television operations, however, we must rely entirely on cable operators to achieve compliance with our prescribed standards.

I would hope that, before March 31, 1977, the State of Ohio and other similar jurisdictions will seriously consider the need to clarify the status of cable regulation so that the Commission's regulatory approach can be fulfilled. While I agree that cable development should not be unnecessarily delayed in localities where no governmental authority exercises jurisdiction or where there is a jurisdictional dispute, I intend to remain alert to any problems that could adversely affect the subscribing public.

F.C.C. 73-204

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
ORANGE CABLEVISION, INC., ORLANDO, FLA.	CAC-103, FL181
ORANGE CABLEVISION, INC., WINTER PARK, FLA.	CAC-104, FL189
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released February 28, 1973)

BY THE COMMISSION:

1. On March 31, 1972, Orange Cablevision, Inc., filed certificate of compliance applications (CAC-103 and 104) for the addition of television signals to its existing cable television systems at Orlando and Winter Park, Florida, located within the Orlando-Daytona Beach, Florida market (55th largest). On May 16, 1972, the licensee of Station WMFE-TV, Orlando, Florida, filed a "Petition of Florida Central East Coast Educational Television, Inc." opposing the applications.

2. Prior to March 31, 1972, and in compliance with our rules, the Orange systems were providing the following television signals to their subscribers:

WESH-TV (NBC Channel 2), Daytona Beach, Florida.
WDBO-TV (CBS Channel 6), Orlando, Florida.
WFTV (ABC Channel 9), Orlando, Florida
WMFE-TV (Educ. Channel 24), Orlando, Florida.
WEDU (Educ. Channel 3), Tampa, Florida.
WUSF-TV (Educ. Channel 16), Tampa, Florida.

On July 29, 1970 and December 2, 1971, respectively, the Orlando and Winter Park systems were authorized to carry Stations WUSF-TV, WEDU, and WUFT (Educ.), Gainesville, Florida, by grant of their petitions for waiver of former Section 74.1107 of the Rules by the Chief, Cable Television Bureau, pursuant to delegated authority (CATV 100-500 and 100-620); however, neither system has ever carried WUFT. The subject applications, as amended, request authorization to add the following signals:

WUFT (Educ. Channel 5), Gainesville, Florida.
WCIX-TV (Ind. Channel 6), Miami, Florida
WLTV (Spanish language, Channel 23), Miami, Florida.
WTOG (Ind. Channel 44), St. Petersburg, Florida.
WSWB-TV (C.P. Channel 35), Orlando, Florida.

Carriage of these signals is consistent with the provisions of Section 76.61 (b) and (d) of the Rules.

3. In its petition, Florida Central objects to the continued carriage of WEDU, and urges that the grandfathered status of WUFT, conferred by the prior authorizations, be revoked. In support of its request, Florida Central argues that: (a) importation of distant educational signals will adversely affect its economic viability; (b) earlier station personnel did not object to carriage of WUFT in 1970 and 1971 because they did not recognize the potential impact of cable carriage of distant signals; and (c) the systems are within WMFE–TV's "sphere of influence". With respect to (c), on May 1, 1972, the Managers of Educational Stations WEDU, WUFT, and WMFE–TV signed a joint agreement recognizing WMFE–TV's sphere of influence and stating that "we wish to express our desire that the other noncommercial signals being imported by CATV systems in the WMFE–TV sphere of influence be removed."

4. Florida Central previously presented the same arguments in opposition to the certification of new cable systems in the Orlando-Daytona Beach market. See *e.g.*, *Orange Cablevision, Inc.*, FCC 73–76 —— FCC 2d ——; FCC 73–79, —— FCC 2d ——. We again reject these arguments for the reasons given in the cited cases. Since carriage of WUFT is grandfathered, Florida Central has a "substantial burden" in seeking to prevent its certification. See *Fort Smith TV Cable Company*, FCC 73–151, —— FCC 2d ——; para. 112, *Cable Television Report and Order*, 36 FCC 2d 143. This is even more so, where, as in the case of WEDU, the signal has already been carried for a period of time. Since Florida Central has failed to provide the required "clear showing," *Ibid.*, and has not otherwise met its burden, its objections to carriage of WUFT and WEDU must be denied.

In view of the foregoing we find that grant of the above-captioned applications would be consistent with the public interest.

According, IT IS ORDERED, That the "Petition of Florida East Coast Educational Television, Inc." filed May 16, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–103; CAC–104) ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-240

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS BY ABC AND NBC FOR WAIVERS OF THE PRIME TIME ACCESS RULE IN CONNECTION WITH SPORTS EVENTS IN MARCH AND APRIL 1973

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Commission here considers certain requests for waiver of the "prime time access rule" (Section 73.658(k) of the Commission's Rules) in petitions filed by American Broadcasting Companies, Inc. (ABC) and National Broadcasting Company, Inc. (NBC) on November 17 and October 31, 1972, respectively, all dealing with sports events. A December 13, 1972 decision (FCC 72-1131 released December 19, 1972, 26 R.R. 2d 11) dealt with requests through February 28, 1973. This present action does not deal with one remaining request in the NBC petition, concerning waiver for its "Miss America" broadcast in September 1973; this will be considered, and appropriate action taken, in the near future (NBC has requested as early a decision as possible in that matter).

2. The events involved here are all sports events involving possible "runovers", i.e., where the game is scheduled for a certain amount of time but may unexpectedly run longer, and in that event would either run from the late afternoon over into prime time (i.e., after 7 p.m. E.T.), or, if scheduled in the evening, consume more than the allotted amount of prime time. In "footnote 35" of the May 1970 Report and Order adopting the prime time access rule (23 FCC 2d 382, 395) it was stated that waivers would be granted in cases where the event and telecast would normally conclude within the period allowed, but might occasionally run longer because of weather delays, overtime, etc. beyond the control of the network. The events dealt with here include one for ABC, an NBA pro basketball game scheduled for 4:45 to 7 p.m. E.T. on Sunday, March 25, and several for NBC. NBC's events include NCAA afternoon basketball double-headers during the NCAA playoff period, March 10, 17 and 24, 1973 (apparently scheduled from 2 to 6 p.m. E.T. or local time), regular season and some Stanley Cup hockey games in the afternoon during March and April (the regular season games are all on Sundays and apparently none is scheduled to start after 3 p.m. E.T.); the NCAA final game scheduled

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for 9:00 p.m. E.T. on Monday, March 26, 9–11 p.m. E.T.; and two Stanley Cup hockey games scheduled at night in April. NBC's petition of October 31, 1972, asked for a blanket waiver for these hockey and basketball games, on the assumption that the telecast will normally last no more than the scheduled time of 2 hours for basketball and 2½ hours for hockey.

3. Certain developments appear to indicate that, event in the normal course of events, there is a substantial chance that NBC's telecasts might run longer than the two hours scheduled for basketball and two and a half hours for hockey (these included a 1972 NCAA basketball telecast for which waiver was granted, and which ran some 12½ minutes over two hours and into prime time, and a January 1973 hockey telecast which ran about 10 minutes over the 2½ hour allotment). In a letter of February 13, 1972, counsel for NBC states that its scheduling arrangements mentioned in the previous paragraphs have been modified somewhat with respect to the proposed afternoon games, so that no coverage is contemplated of NCAA afternoon basketball games starting later than 4:45 p.m. E.T. or P.T. (3:45 p.m. C.T. and M.T.) and no coverage of afternoon hockey games (regular season or Stanley Cup) starting after 4:15 E.T. (3:15 C.T.). Thus, it appears that, in effect, the scheduling allotments for these games have been increased to 2 hours 15 minutes for basketball and 2 hours 45 minutes for hockey.

DISCUSSIONS AND CONCLUSIONS

4. Upon consideration of the foregoing matters (including NBC's revision) we are of the view that waiver is warranted as requested, in case it should be necessary because of the unusual length of the games. As far as the various afternoon basketball and hockey games are concerned, and the amount of time allotted for these—two hours 15 minutes for basketball, and two hours 45 minutes for hockey—it appears that this should be sufficient to allow completion of the games before the beginning of prime time, in the absence of overtime or other really unusual circumstances. Therefore the telecasts fall within the principle of "footnote 35" in the May 1970 decision adopting the rule (mentioned above), and a number of later Commission decisions applying it, in which waiver was granted where it appeared that the game should in normal course be over by the beginning of prime time, but overtime or other really unusual developments might make it run over. This general principle appears to apply here, with two hours 15 minutes allotted for the basketball games and two hours 45 minutes for hockey.

5. As to NBC's contemplated evening telecasts—two Stanley Cup hockey games and one basketball game—it appears not quite as likely that these will be over in the allotted time, which is still two hours for basketball and two hours 30 minutes for hockey. However, it is also to be borne in mind that in these cases the "overrun", if it occurs at all, falls outside of prime time in most of the country, after 11 p.m. E.T. or 10 p.m. C.T. It is only in the Mountain and Pacific time zones, which have fewer than 20% of the top 50 markets of the nation

or the TV homes in them, where there are possible problems in relation to the prime time access rule. In these circumstances, the Commission has in the past been fairly liberal, recognizing the problems which arise from the time-zone difference, particularly where live, simultaneous programming such as sports events is involved. See, for example, *Academy Awards* and *Miss America*, 33 FCC 2d 743 (February 1972); *Democratic National Telethon Committee*, 35 FCC 2d 770 (June 1972). Accordingly, and also since there is at least a fair chance that the telecasts will be completed within the periods allocated for them, waiver in these cases, in case it should be necessary, appears also to be appropriate.

6. In view of the foregoing, IT IS ORDERED That:

(1) Stations affiliated or under common ownership with the American Broadcasting Companies, Inc. (ABC) or National Broadcasting Company, Inc. (NBC) television network MAY CARRY TO CONCLUSION (but not including any post-game material), without counting toward the permissible three hours of network prime time programming on the evening involved, NBA or NCAA basketball telecasts beginning no later than 4:45 p.m. E.T. (3:45 p.m. C.T.), and NHL regular season and Stanley Cup playoff games beginning no later than 4:15 p.m. E.T. (3:15 p.m. C.T.) on dates in March and April 1973; and

(2) Stations affiliated with or under common ownership with the NBC television network in the Mountain and Pacific time zones MAY CARRY TO COMPLETION NCAA basketball championship games or NHL Stanley Cup Championship games beginning at or after 8 p.m. E.T., on dates in March and April 1973, without any of the time beyond two hours for basketball games and 2½ hours for hockey games counting toward the permissible three hours of network programming on the evening involved.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–174

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
QUINNIPIAC VALLEY SERVICE, INC., WALLINGFORD, CONN.	Docket No. 19686 File No. BP–14832
Requests: 860 kHz, 500 W, DA, Day	
RADIO RIDGEFIELD, INC., RIDGEFIELD, CONN.	Docket No. 19687 File No. BP–18494
Requests: 850 kHz, 1 kW, DA, Day	
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 23, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration (i) the above-captioned applications which are mutually exclusive in that operation by both applicants would entail contour overlap prohibited by section 73.37 of the Commission's rules; (ii) a Quinnipiac Valley Service, Inc. (Quinnipiac), petition for reconsideration of its dismissal by the Commission filed February 12, 1971; (iii) an opposition filed by Meriden-Wallingford Radio, Inc. (Meriden-Wallingford), then-licensee of WMMW, Meriden, Connecticut;[1] (iv) the applicant's reply; (v) a supplement to the petition filed December 14, 1972; (vi) a petition to deny filed against Quinnipiac by WSBS—The Berkshires, Inc., licensee of WSBS, Great Barrington, Massachusetts, on March 4, 1964; (vii) a petition to deny filed by Columbia Broadcasting System, Inc. (CBS), a licensee of WCBS, New York, New York, on March 16, 1964; (viii) a petition to deny by Meriden-Wallingford filed February 27, 1969; and (ix) pleadings in response filed by Quinnipiac and replies submitted by CBS and Meriden-Wallingford. Also before us are requests for waivers of various rules by both applicants.

2. In an Order adopted January 13, 1971, the Commission denied Quinnipiac Valley Service, Inc., a waiver of the multiple-ownership rule (section 73.35) and dismissed its application for non-compliance with the duopoly portion of the rule. 27 FCC 2d 66, 20 RR 2d 1081.[1a] John T. Parsons, president and 50 percent owner of the applicant, was also president and 45 percent owner of station WOWW, Naugatuck,

[1] Subsequent to the filing of the petition, the license for WMMW was assigned to WMMW, Inc. The new licensee recently informed the Commission that it wished to adopt Meriden-Wallingford's pleadings. The ordering clause in paragraph 26, *infra* (designating parties to the proceeding ordered herein), makes provision for the assignment.

[1a] Prior Commission actions affecting the Quinnipiac application include Orders released July 9, 1964 (FCC 64–631) (holding a drop-out agreement with Radio Wallingford, Inc., a former competing applicant, in abeyance); and October 16, 1964 (FCC 64–937) (giving formal approval to the drop-out agreement).

Connecticut, about 12 miles away. Grant of the application would have resulted in overlap of the respective 1 mV/m contours. Quinnipiac filed a petition for reconsideration, eliciting opposition from Meriden-Wallingford. When Parsons recently severed his connection with WOWW (effective October 1, 1972), he cured the cause for dismissal and mooted the pleadings directed toward the above issue. Accordingly, the petition for reconsideration will be dismissed and the application reinstated on our own motion.

3. Reinstatement of Quinnipiac's proposal, however, necessarily revives previous objections directed against the application which had been mooted by the Commission's aforementioned dismissal. Allegations included charges of objectionable interference and prohibited overlap filed by the Columbia Broadcasting System, licensee of WCBS, New York, New York, ascertainment, financial and interference allegations made by Meriden-Wallingford, and an interference claim by WSBS—The Berkshires, Inc., licensee of WSBS, Great Barrington, Massachusetts.

4. The competing application filed by Radio Ridgefield proposes a standard broadcast facility in Ridgefield, Connecticut. Radio Ridgefield tendered its application for filing on February 27, 1969, the cut-off date assigned the Quinnipiac application. However, the Ridgefield application also directly conflicted with an application filed by Wayne County Broadcasting Corp. for Honesdale, Pennsylvania, which had a cut-off date of June 19, 1968.[2] This, Radio Ridgefield was considered to have filed too late, and its application was not accepted. The applicant petitioned for acceptance arguing that the mutual exclusivity between the Wayne County proposal and one of the connecting applications (that of Peter L. Pratt for Honesdale) did not exist, and hence, it was not tied to the 1968 cut-off date. At the same time, it petitioned alternatively for a waiver of the cut-off rules based on charges that it has been unfairly tied to the earlier cut-off date by the filing of applications in abuse of the Commission's processes. Since it appears that the filing of the Pratt and General Broadcasting proposals did involve abuse of our processes (*Wayne County Broadcasting Corp.*, 26 FCC 2d 52 (1970)), we believe that under the unique circumstances presented, a waiver of the cut-off rules is warranted.[3]

5. The Quinnipiac and Ridgefield proposals involve prohibited overlap of contours with a frequency separation of 10 kHz.[4] Since they are, then, mutually exclusive, they will be designated for hearing in a consolidated proceeding on the issues specified below. Although section 1.580(b) of the Commission's rules provides that no application will be acted upon less than 30 days following issuance of public notice of the acceptance of the application, the Commission will, on its own motion,

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[2] Radio Ridgefield's proposal conflicted with an application by the General Broadcasting Corporation for Yorktown Heights, New York (BP–18219), which was mutually exclusive with an application by Peter L. Pratt for Honesdale, Pennsylvania (BP–18233), which was, in turn, mutually exclusive with the Wayne County Broadcasting Corporation application for Honesdale (BP–18018).

[3] Moreover, we note that the chain connecting Radio Ridgefield to Wayne County's application was broken by dismissal of the General Broadcasting Corporation application on October 7, 1970.

[4] Section 73.37(a) of the Commission's rules.

waive section 1.580(b) with respect to Radio Ridgefield so that the applications herein may proceed to hearing without further delay.

6. CBS alleges that the Quinnipiac operation would cause objectionable interference within the WCBS 0.5 mV/m contour in contravention of section 73.182(w) of the rules, and that there would be prohibited overlap of the 2 mV/m and 25 mV/m contours of stations 20 kHz removed in violation of section 73.37. Section 73.182(w) was amended July 1, 1964 (Docket No. 15084, 2 RR 2d 1658), to eliminate the provision concerning interference based on a 1 : 30 ratio, and hence, poses no bar to the applicant. But, according to Quinnipiac's own studies, the proposed operation would involve 2 mV/m and 25 mV/m overlap with WCBS. The applicant contends the overlap should not be considered objectionable because (i) it is due to a long salt-water path, and (ii) its application was filed prior to adoption of the prohibited overlap provisions of section 73.37. With regard to the first contention, we note that our rules do not sanction such overlap merely because it may be due to a high conductivity path. And concerning the latter, at the date of filing (May 3, 1961), section 3.37 [5] was in effect and clearly prohibited overlap of the 25 mV/m and 2 mV/m groundwave contours for stations operating on frequencies 20 kHz removed. Moreover, in this instance, the question of whether a waiver should be granted is more fit for resolution in an evidentiary hearing, and not by summary decision based on pleadings alone.[6]

7. The Commission also finds that the 2 mV/m contour of WRYM, New Britain, Connecticut (another station 20 kHz removed), would be separated from Quinnipiac's proposed 25 mV/m contour by only about 0.6 mile based on Figure M–3 conductivities. Since no measurement data are available to establish the extent of the WRYM 2 mV/m contour and since Figure M–3 is not intended to accurately depict conductivity over such short paths (approximately 15 miles), we conclude that a substantial question exists as to whether prohibited overlap of the 2 mV/m and 25 mV/m contours would result with WRYM. Appropriate issues will be specified with respect to the overlap with WCBS, and the possible overlap with WRYM. Columbia Broadcasting System, Inc., and Hartford County Broadcasting Corp., licensees of the respective stations, will be made parties to the proceeding.

8. WSBS—The Berkshires, Inc., licensee of WSBS, Great Barrington, Massachusetts, filed a petition to deny alleging the proposed operation would cause interference to WSBS. Quinnipiac subsequently amended its application (October 20, 1969) and the Commission now finds that objectionable interference would not be caused WSBS. Accordingly, the WSBS petition to deny will be dismissed.

9. Meriden-Wallingford claimed standing as a party in interest based on the allegation that Quinnipiac's operation would be within

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[5] § 3.37 Minimum Separation Between Stations: A license will not be granted for a station on a frequency of ±30 kc from that of another station if the area enclosed by the 25 mv/m groundwave contours of the two stations overlap, nor will a license be granted for the operation of a station on a frequency ±20 kc or ±10 kc from the frequency of another station if the area enclosed by the 25 mv/m groundwave contour of either one overlaps the area enclosed by the 2 mv/m groundwave contour of the other.

[6] Since the application was filed prior to adoption of section 73.37 (the "go-no go" rules) (July 1, 1964) it can be accepted for filing. *Compare* section 3.37, *with* section 73.37(a).

its service area and compete with it for advertising revenue. The Commission finds that Meriden-Wallingford had the requisite standing as a party in interest within the purview of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 9 RR 2008 (1940).

10. Meriden-Wallingford charged in its initial pleading that 11.3 percent of the population within Quinnipiac's normally protected contour would receive interference from WSBS, WRYM, and WIEL, Philadelphia, Pennsylvania. While this exceeded the "10% Rule" allowed for applications filed before July 13, 1964, Quinnipiac's engineering amendment of October 20, 1969, reduced proposed power to 500 watts, and the segment of the population that would receive interference to 3.74 percent. There appears, then, to be no violation of section 73.28(d)(3).[7]

11. Meriden-Wallingford also faults the application for lack of a community survey and for an inadequate financial showing. Although the applicant has since supplied an ascertainment of community needs, its survey is defective. Quinnipiac indicates that 19 persons of below-average income were contacted either in person or by telephone, and that the remaining 32 people interviewed were all in the community leader category. Yet, there is no showing that any of these leaders was representative of the below-average income group. (See questions 13(a) and 16 of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 36 F.R. 4092, 4105 (March 3, 1971)). Furthermore, Quinnipiac's public service proposals are too indefinite for us to conclude that they will be responsive to Wallingford's problems. For example, drug abuse is cited as a problem, but the applicant makes no programming response; a daily student show is mentioned, but no specifics offered; tape-recorded playback of town council meetings is proposed, but no time slot or duration suggested; and, if Quinnipiac fails to locate the announcer-host for its telephone talk show (as it suggests might happen), then this applicant will utterly lack any regularly scheduled programming for the discussion of community problems. *See* question 29 of the *Primer*, *supra*. Thus, substantial questions exist as to the adequacy of the applicant's ascertainment of its community's needs and its response to those needs. Therefore, a *Suburban*[8] issue will be specified.

12. The applicant has updated its financial data several times since the initial filing, but it appears inadequate. First, its most recent financial data is now two years old. Second, even using the applicant's 1970 figures, costs of construction and operating expenses for the first year exceed available assets. According to its estimates, costs total $125.000, broken down as follows: down payment on equipment, $11,920; first-year's payments on equipment with interest, $11,580; building, $3,000; land, $1,000; miscellaneous, $7,500; and one-year's working capital, $90,000. Assets included existing capital, $1,000; new capital, $9,000;

[7] Meriden-Wallingford also contends that the Quinnipiac proposal involves prohibited overlap with WCBS and WRYM. As explained in paragraphs 6 and 7, *supra*, issues are being specified in this regard.

[8] *Suburban Broadcasters*, 20 RR 951 (1961).

stockholder loan obligations, $31,000; and a bank loan commitment of $30,000, for a total of $71,000. The stockholder loan agreement fails to specify the terms upon which the principals will loan the $31,000 to the applicant corporation and, apart from the current obsolescence of both principals' financial statements, that of John T. Parsons was inadequate when submitted. Thus, anticipated expenditures exceeded available assets by at least $54,000. Issues will be specified in order to permit a determination of the current financial status of Quinnipiac's principals and whether sufficient funds are available to meet the cost of construction and one year's operation.

13. Finally, Meriden-Wallingford claims that the "drop-out" agreement between Quinnipiac and Radio Wallingford, Inc. (a former competing applicant for a Wallingford license) (hereafter Radio Wallingford), is contrary to the public interest. The petition to deny is, in this respect, a petition for reconsideration of our previous Order approving the agreement,[9] and is in obvious non-compliance with section 405 of the Communications Act of 1934, as amended, and section 1.106(f) of our rules. Its petition was filed over four years after approval by the Commission, whereas the Act requires such filings within 30 days. But, inasmuch as the pleading was timely filed as a petition to deny,[10] we will address ourselves to petitioner's contentions.

14. In return for Radio Wallingford's agreement to suffer dismissal, Quinnipiac has extended the former applicant the option of reimbursement in cash of $3,500, or assignment of 50 percent of Quinnipiac's stock, contingent upon a grant of the latter's application. Meriden-Wallingford asserts that by the terms of the option, Quinnipiac is "committed" to transferring 50 percent of its stock to a company which, several years after the agreement's approval, may be unqualified, and that the agreement fails to extract any continuing financial support from Radio Wallingford in return for receipt of Quinnipiac stock.

15. The petitioner's concern is groundless. First of all, the Commission has already approved this agreement once. Second, even if circumstances have since changed, Quinnipiac is not "committed" to conveying its stock to a perhaps now-unqualified Radio Wallingford since our approval must also be secured prior to consummation to effect a lawful transfer of control. And that sanction is based on a reappraisal of the prospective part-owner's qualifications, as well as the terms of the agreement. The petitioner's vague, unsupported conclusions fail to raise substantial and material questions of fact warranting designation of an issue.

16. Radio Ridgefield is in violation of section 1.569(b)(2)(i) of the rules in that the proposed transmitter site lies beyond a 500-mile extension of the 0.5 mV/m-50% nighttime skywave contour of class I–A station WBAP, Fort Worth, Texas, on 820 kHz (a "frozen" channel 30 kHz removed from the proposed frequency). The appli-

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[9] Tentative approval was given July 8, 1964 (FCC 64–631, 3 RR 2d 1005) and, after compliance with the publication requirements of section 1.525(b) of the rules, final approval on October 14, 1964 (FCC 64–937).

[10] The petition to deny was filed on February 27, 1969, the cut-off date for Quinnipiac, in accordance with section 309(d)(1) of the Act.

cant requests a waiver of this section and the Commission grants it since this is in keeping with past policy holding that proposals 30 kHz removed from class I–A channels do not materially prejudice future consideration of those channels. *See*, e.g., *Peter L. Pratt*, 16 FCC 2d 967, 15 RR 2d 933 (1969).

17. Radio Ridgefield will be given the opportunity to correct deficiencies in its financial showing at hearing. First, the applicant's cost figures are now nearly three years old and must be updated. Second, the applicant relies almost exclusively on a $100,000 loan from its president, Bartholomew T. Salerno, to demonstrate its financial qualifications. But Mr. Salerno's financial statement fails to establish that the real estate values cited were based on appraisal by an independent real estate agent. Also, the letter evidencing willingness to make the loan fails to state whether any security is required, as prescribed by paragraph 4(a), section III, FCC Form 301.[11] The appropriate issues are designated.

18. Radio Ridgefield has been faulted for failure to provide a 5 mV/m signal over the entire political subdivision known as Ridgefield Township (see section 73.188(b)(2)). On February 9, 1971, Radio Ridgefield amended its application and now proposes to serve primarily the unincorporated population center of the township.[12] This amendment shows that the proposed 25 mV/m contour encompasses all of the business area, and the 5 mV/m contour more than covers all of the population center of Ridgefield, both in conformity with section 73.188(b) of the rules. Accordingly, the applicant's proposal will be construed as specifying Ridgefield center as the community of license.[13]

19. However, the Ridgefield proposal also clearly projects the 5 mV/m contour as penetrating the Danbury corporate limits, to which the 1970 census assigns a population of 50,781,[14] a figure more than twice the population of Ridgefield center.[15] These facts raise a presumption that Radio Ridgefield's operation is intended to serve the community of Danbury, rather than the community of Ridgefield center.[16] An appropriate section 307(b) suburban community issue will be designated to give the applicant an opportunity to rebut this presumption.

20. From the information before the Commission it appears that, except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, for the

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[11] Mr. Salerno is not the sole stockholder of the applicant corporation. Mr. Paul A. Christo, vice-president of the applicant, owns 10 percent of the stock.

[12] Section 73.30(a) sanctions the grant of licenses to stations assigned to unincorporated communities. *North Atlanta Broadcasting Co.*, 1 RR 2d 275 (Review Board 1963).

[13] Were this applicant to designate the whole of Ridgefield Township as the community of license, serious section 73.37(b) problems would be raised since prohibited overlap would exist with co-channel stations WHDH, Boston, Massachusetts, and WEEU, Reading, Pennsylvania, and since the 1970 U.S. census shows a northern portion of the township as embraced in the Danbury urbanized area with the township population remaining below 25,000.

[14] Danbury city has been treated as co-extensive with the town of Danbury since 1960, for Bureau of Census purposes, and the same population reported for both.

[15] The Bureau of the Census reports the 1970 population of Ridgefield center as 5,878 and that of Ridgefield Township as 18,188.

[16] *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965).

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reasons indicated above, they must be designated for hearing in a consolidated proceeding on the issues set forth below.

21. Accordingly, IT IS ORDERED, That the application of Quinnipiac Valley Service, Inc., IS REINSTATED on our own motion; that the application of Radio Ridgefield, Inc., IS HEREBY ACCEPTED FOR FILING; that, on the Commission's own motion, section 1.580(b) of the Commission's rules IS WAIVED; and that, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary aural (1 mV/m or greater in the case of FM) service to such areas and populations.

2. To determine whether overlap of the 2 and 25 mV/m contours would occur between the Quinnipiac proposal and WCBS, New York, New York, in contravention of section 73.37 of the Commission's rules, and, if so, whether circumstances exist which would warrant a waiver of said section.

3. To determine whether overlap of the 2 and 25 mV/m contours would occur between the Quinnipiac proposal and WRYM, New Britain, Connecticut, in contravention of section 73.37 of the Commission's rules, and, if so, whether circumstances exist which would warrant a waiver of said section.

4. To determine the efforts made by Quinnipiac Valley Service, Inc., to ascertain the community problems of the area to be served and the means by which the applicant proposes to meet those problems.

5. To determine, with respect to the application of Quinnipiac Valley Service, Inc.:

(a) Whether John T. Parsons and James W. Miller have sufficient net liquid and current assets to meet their respective loan commitments;

(b) Whether sufficient additional funds are available to meet construction costs and operating expenses for the first year;

(c) The current basis for the applicant's estimated construction costs and operating expenses for the first year; and

(d) In light of the evidence adduced pursuant to (a), (b), and (c), above, whether the applicant is financially qualified.

6. To determine whether the proposal of Radio Ridgefield, Inc., will realistically provide a local transmission facility for its specified station location, or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs;

(b) The extent to which the needs of the specified station location are being met by existing aural broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

7. To determine, in the event that it is concluded pursuant to the foregoing issue that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service; namely, Danbury, Connecticut.

8. To determine, with respect to the application of Radio Ridgefield, Inc.:

(a) Whether Bartholomew T. Salerno has sufficient net current and liquid assets to loan $100,000 to the applicant, and what, if any, security will be required;

(b) The current basis of the applicant's estimated construction costs and operating expenses for the first year; and

(c) In light of the evidence adduced pursuant to (a) and (b), above, whether the applicant is financially qualified.

9. To determine, in light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

10. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

22. IT IS FURTHER ORDERED, That, the Memorandum Opinion and Order of January 13, 1971, 27 FCC 2d 66, dismissing the application of Quinnipiac Valley Service, Inc., IS SET ASIDE and that the petition for reconsideration, and supplement, filed by Quinnipiac Valley Service, Inc., ARE DISMISSED as moot.

23. IT IS FURTHER ORDERED, That, the request of Radio Ridgefield, Inc., for waiver of section 1.569(b)(2)(i) of the rules IS GRANTED; that, the request for waiver of sections 1.571(c) and 1.227(b)(1), (4) IS GRANTED.

24. IT IS FURTHER ORDERED, That the petition to deny the application of Quinnipiac Valley Service, Inc., filed by WSBS—The Berkshires, Inc., IS HEREBY DISMISSED.

25. IT IS FURTHER ORDERED, That the petitions of the Columbia Broadcasting System, Inc., and of Meriden-Wallingford Radio, Inc., directed against the application of Quinnipiac Valley Service, Inc., ARE GRANTED to the extent indicated above and ARE DENIED in all other respects.

26. IT IS FURTHER ORDERED, That the Columbia Broadcasting System, Inc., Hartford County Broadcasting Corp., and WMMW, Inc., ARE MADE PARTIES to the proceeding.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and parties respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-232

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 1 OF THE COMMISSION'S RULES TO REQUIRE SIMULTANEOUS PAYMENT OF THE FILING AND GRANT FEE WITH AN APPLICATION FOR CERTIFICATION OR TYPE ACCEPTANCE	Docket No. 19642

REPORT AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION:

1. On November 22, 1972, the Commission adopted a Notice of Proposed Rule Making in the subject proceeding. The date for receiving comments closed on January 8, 1973, and for reply comments on January 18, 1973.

2. This Notice proposed that, to simplify administration, the applicant for certification or type acceptance pay the required filing fee and grant fee simultaneously. The Notice further proposed that such payment be made at the time the application for certification or for type acceptance is filed and that no action be taken on the application until such combined payment is made.

3. Comments were received from one manufacturer of aeronautical radio equipment—Narco Avionics, who agreed with the Commission that simultaneous payment of filing and grant fees would be desirable and would simplify bookkeeping and administrative problems. However, Narco proposes that the procedure be further simplified by requiring the simultaneous payment after certification or type acceptance has been granted on the grounds that this would avoid the need for making a refund if no grant were issued.

4. The Commission cannot accept Narco's proposal. As pointed out in paragraph 4 of the Notice, our experience has been that better than 95% of the applications are granted. Moreover, we have found that in a significant number of cases, the applicant did not pay the grant fee within the period allowed and it was necessary to dun the applicant for such payment. In the opinion of the Commission, the need to make a refund is outweighed by the problem of late payment, and we must insist on prepayment of the combined filing and grant fee as the more desirable administrative approach.

5. Accordingly, the regulation requiring prepayment of the combined fee is adopted herein. To provide a reasonable transition period,

simultaneous payment will not be required prior to July 1, 1973. However, no application will be accepted for processing after that date unless the combined payment is submitted with the application.

6. Authority for the adoption of the amendments herein proposed is contained in Section 4(i) of the Communications Act (47 U.S.C. 154(i)), Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483(a)), and Budget Bureau Circular A–25 and supplements thereto.

7. IT IS ORDERED that, effective April 16, 1973, Part 1 of our rules is amended as set out in the Appendix, and that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 1 of Chapter I, Title 47, of the Code of Federal Regulations is amended as follows:

1. Section 1.1102 is amended by adding a note immediately after paragraph (b), revising paragraphs (d) and (g) and adding a new (j) to read as follows:

§ 1.1102 *Payment of Fees.*

* * * * * * * *

(b) * * *

NOTE: Combined fees. See paragraph (j) of this section concerning simultaneous payment of filing and grant fees with applications for type acceptance or certification of equipment.

* * * * * * * *

(d) Where a separate grant fee payment is prescribed in the various services, the fee will be payable within 45 days after grant by the Commission. In the broadcast services, the grant fee, based on a percentage of the consideration in assignment and transfer cases must be transmitted by the new licensee immediately following consummation of the transfer or assignment. All grants, approvals and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period. Failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date.

* * * * * * * *

(g) Applications and attached fees should be addressed to Federal Communications Commission, Washington, D.C. 20554, or to the appropriate FCC Field Office and should not be marked for the attention of any individual bureau or office. Fee payments should be in the form of a check or money order payable to the Federal Communications Commission. The Commission will not be responsible for cash sent through the mails. All fees collected will be paid into the U.S. Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483(a)).

* * * * * * * *

(j) Combined filing and grant fees with applications for certification and type acceptance of equipment: Each application for certification or type acceptance of equipment shall be accompanied by a combined payment covering the filing and grant fees for such application. Payment of filing and grant fees separately is permissible until July 1, 1973; however, appli-

cants are encouraged to submit fees simultaneously prior to this date. On or after July 1, 1973, applications will not be processed prior to payment of the combined filing and grant fees.

2. Section 1.1103 is amended by adding a new paragraph (c) to read as follows:

§ 1.1103 *Return or refund of fees.*

* * * * * * *

(c) Grant fees received as part of a combined fee payment pursuant to §1.1102 (j) will be refunded in the following instances:

(1) When an application for certification or type acceptance is dismissed or denied by the Commission.

(2) When a request for withdrawal of the application is received prior to the date of grant of certification or type acceptance.

(3) When the failure of an applicant for certification or type acceptance to reply to a request for additional information results in a dismissal of the application.

§1.1120 [Amended]

3. In Section 1.1120, add footnote 10 to the table headings "Certification" and "Type Acceptance" and insert the following footnote at the bottom of the text:

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[10] After July 1, 1973, the filing fee and the grant fee must be paid simultaneously when an application for certification or for type acceptance is filed. See §§ 1.1102(j) and 1.1103(c).

F.C.C. 73-169

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2 OF THE COMMISSION'S RULES TO CONFORM, TO THE EXTENT PRACTICABLE, WITH THE GENEVA RADIO REGULATIONS, AS REVISED BY THE SPACE WARC, GENEVA, 1971	Docket No. 19547

REPORT AND ORDER

(Adopted February 14, 1973; Released February 23, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. The Commission, on July 14, 1972, adopted a Notice of Proposed Rule Making in the above captioned proceeding, which was released on July 26, 1972, and published in the Federal Register on August 4, 1972 (37 FR 15714). A correction of the Federal Register was published on November 28, 1972 (37 FR 25175). The time for filing comments and reply comments was originally established as September 29, 1972, and October 10, 1972. Pursuant to the filing of Motions to Extend by the Central Committee on Communications Facilities of the American Petroleum Institute and the Utilities Telecommunications Council, the time for filing comments and reply comments was extended, by Order of the Commission's General Counsel released October 2, 1972, to October 30, 1972, and November 10, 1972, respectively. Pursuant to a filing by Communications Satellite Corporation, the time for filing reply comments was, by Order of the Commission's General Counsel released on November 10, 1972, extended to November 17, 1972.

2. Comments were filed by the Association of Maximum Service Telecasters (AMST); MCI-Lockheed Satellite Corporation (MCI); Department of Health, Education, and Welfare (HEW); American Telephone and Telegraph Company (AT&T); National Association of Manufacturers (NAM); Aeronautical Radio, Inc. and the Air Transport Association of America (Arinc/ATA); Corporation for Public Broadcasting (CPB); Joint Council on Educational Telecommunications (JCET); General Electric Company (GE); National Association of Broadcasters (NAB); Central Committee on Communication Facilities of the American Petroleum Institute (API); Communications Satellite Corporation (ComSat); Fairchild Industries (Fairchild); and Utilities Telecommunications Council (UTC). Reply comments were timely filed by the following entities: Hughes Aircraft

Company (Hughes); CPB; AMST; MCI-Lockheed; AT&T; ComSat; and the ABC, CBS and NBC Television Network Affiliates Association (Affiliates).

3. As set forth in the Notice, the purpose of the instant proceeding was to align to the extent practicable Part 2 of the Commission's Rules and Regulations with the international Radio Regulations as revised by the Space World Administrative Radio Conference held in Geneva, Switzerland in June–July 1971. The majority of the proposed changes set forth in the Notice evoked no response; however, several of the proposed changes, particularly those affecting sharing of certain microwave bands and the reservation of spectrum for satellite broadcasting, generated substantial controversy. These areas will be discussed in succeeding paragraphs.

BROADCASTING SATELLITE SERVICE

4. In the Notice, the Commission proposed to make the following bands available to the broadcasting-satellite service: 2500–2690 MHz shared; 11.7–12.2 MHz in Regions 2 and 3, shared; 41.0–43.0 GHz; and 84–86 GHz exclusive.

It was pointed out that there were no present plans to implement a broadcasting-satellite service on either a domestic or an international basis and that our intentions with respect to the service were to keep our options open for the foreseeable future during which the results of the WARC remained in force.

In carrying out these intentions, the Commission proposed to refrain from reflecting footnote 332A in the national Table of Frequency Allocations. This footnote, adopted at the Space WARC, would have permitted access to the band 620–790 MHz in developing a broadcasting-satellite service. This decision reflected a national unwillingness, at this time at least, to encourage development of the service in that band.

5. With the exception of ComSat, other respondents who commented in this matter supported the Commission's desire to refrain from reflecting footnote 332A in the 620–790 MHz band. ComSat, while concurring with the aforestated philosophy, did not agree that inclusion of the footnote would constitute a commitment to use the band for the broadcasting satellite service. On the contrary, ComSat believed that such an omission would indicate a lack of interest, on the part of the U.S., in developing the service in that band.

6. GE, NAB and AMST not only supported the concept of open options, but expressed the view that attempts to suballocate or designate the 11.7–12.2 GHz band or any portion thereof for a domestic broadcasting satellite service were inconsistent with that concept. AMST also expressed the same view with respect to the 41–43 GHz and 84–86 GHz bands.

7. The proposed allocation of the 11.7–12.2 GHz band drew the heaviest volume of comments. Although the proposed Table of Frequency Allocations reflected the broadcasting-satellite and fixed satellite services sharing on a coequal primary basis with the mobile service sharing on secondary basis, paragraph 11 of the Notice indicated the intention

to allocate the lower portion of the band to the fixed-satellite service on a primary basis with the broadcasting satellite service on a secondary basis while, in the upper portion, the allocation status would be reversed. The terrestrial mobile service would, of course, remain secondary throughout the 11.7–12.2 GHz band.

8. The majority of the comments filed with respect to the band 11.7–12.2 GHz cited the many uncertainties surrounding the parameters of any broadcasting satellite service. Uncertainties cited included not only the bandwidth, power flux density, channel requirements, orbit requirements and frequency sharing criteria, but questions with respect to the inter-face policies between the satellite and terrestrial broadcasting services were also raised. In an attempt to obviate these uncertainties in order to proceed with fixed-satellite services, whose parameters are more definable at present, several proponents (MCI, ComSat, Fairchild) suggested the reservation of orbital slots for the broadcasting-satellite service. Others, particularly CPB, HEW, AMST, GE, NAEB and NAB, recommended that any allocation be deferred until additional information concerning the system parameters becomes more defined. AT&T, in their reply comments, believed that such action would not be in the national interest and that an allocation consistent with the U.S. position to the WARC (i.e. as reflected in the proposed table) should be taken. ComSat, in their reply comments, believed deferral of an allocation at this time could be detrimental to our national interests if other countries' systems were developed which would conceivably dictate less than optimum channeling and/or orbital locations.

9. The proposed allocation of the 2500–2690 MHz band to the broadcasting satellite service was generally endorsed although CPB felt that sharing part of the band with the fixed-satellite service might impair the broadcasting service. Additionally, CPB expressed concern over the possibility of a virtual guardband established between radio astronomy and the broadcasting satellite service and believed that footnote U.S. 74 should provide adequate protection. In this connection CPB also expressed the hope that NASA proposed experiments using the ATS–F satellite would provide a better assessment of the interference potential in this regard.

10. A second proposed use of the band which elicited numerous comments dealt with the use of the 2500–2535 MHz band as a downlink and the 2655–2690 MHz band as an uplink in the fixed satellite service. The JCET, CPB, Hughes and ComSat expressed the desire that these bands be made available for use in the contiguous United States, as well as in Alaska, Guam and Hawaii, as proposed in footnote NG 102. Hughes also added that the band is highly desirable for uplinks because of development, power level, cost and reliability status of power transistor amplifiers. HEW cited a lack of clear guidance from the Commission as to the matching uplink for fixed satellite frequencies to feed the broadcasting satellite. ComSat, in their reply comments, saw no justification at this time for restricting the design of satellite systems by assigning a specific up-link frequency band for operation with the 2500–2690 MHz band. Fairchild, pointing to insufficient isolation between the transmitter and receiver, objected to the Commission's proposal, while Hughes Aircraft, basing their

opinion on the design of a satellite transponder using the proposed arrangement, disagreed. Additionally, GE cited possible interference problems in Alaska, Guam and Hawaii, and stated the need for additional restrictions on installation of transmitters in those areas to be served by community satellites in the 2500–2690 MHz band.

11. After a careful review and consideration of the comments and reply comments, the Commission believes the national interest, with respect to frequency allocations for broadcasting satellites, can best be served in the following manner. Initially, it should be reiterated that our basic policy remains as described in paragraph 9 of the Notice and referenced in paragraph 4 above, i.e., keep our options open during the period the Final Acts of the Space WARC remain in force.

12. With respect to the 620–790 MHz band, the Commission is not persuaded that the provisions of footnote 332A would be useful in the United States at this time. Our present posture remains that, to the best of our knowledge, there are no plans in the United States to implement a broadcasting satellite service on either a domestic or international basis in the band 620–790 MHz. The comments of ComSat notwithstanding, we believe reflection of footnote 332A in the 620–790 MHz band would at least imply a willingness nationally to see the service develop in the band—an implication not yet clearly justified. Accordingly, we prefer to adhere to our original posture of not reflecting footnote 332A in the 620–790 MHz band at this time.

13. While the Commission's proposals concerning the 11.7–12.2 GHz and the 41–43 and 84–86 GHz bands might appear to be inconsistent with the approach taken with the 620–790 MHz band insofar as the broadcasting satellite service is concerned (as was alleged by AMST), there is an important distinction. Whereas no plans are known to be under consideration in the United States to use the 620–790 MHz band for broadcasting satellites, studies and experimentation in communication technology by both industry and the NASA are being focused on the use of the 11.7–12.2 GHz band for that purpose. Additionally, since the allocations at 41–43 and 84–86 GHz were made on a world-wide basis, present no known problems domestically, and offer some degree of guidance for future planning, there has been no valid reason demonstrated why those higher bands should not be allocated to the broadcasting service at this time.

14. Our problem with respect to the 11.7–12.2 GHz band lies not with the proposal to allocate the band for the broadcasting satellite service, *per se*, but how sharing with the fixed-satellite and terrestrial mobile services shall be accomplished. As indicated in paragraphs 7 and 8 supra, the sharing methodology proposed drew substantail opposition. This opposition was based primarily on the uncertainties surrounding the technical parameters and the spectrum requirements for a broadcasting satellite service vis-a-vis the fixed satellite service.

15. After reviewing both the comments and the technological state-of-the-art and discussing the matter informally with representatives of industry and other Federal agencies, we agree the allocation proposed is premature and could influence adversely the development of either the broadcasting satellite or fixed satellite services or both.

While the assignment of either orbital arc or orbital slots, as suggested by MCI, ComSat and Fairchild might provide a better solution to the problems raised, the Space Conference rejected that approach. Rather, the Conference adopted a philosophy of flexibility, recognizing equal rights for the radio services and for the Administrations using the shared bands. Procedures were adopted in Article 9A for the accommodation of new operations in the face of operations in being to include relocation of satellites already in place, if necessary.

16. Allowing the band to lie fallow, as suggested by several respondents, would allow the time for each technology to develop more fully; however, as pointed out by AT&T, such action would represent ineffective and inefficient spectrum management. Moreover, we recognize the constraints such action could impose on design and use of satellite systems domestically, if other systems were developed by other countries in an incompatible manner. Consequently, we reject that posture.

17. On balance and, in an effort to retain our flexibility, we will withdraw the proposal to split the 11.7–12.2 GHz band between the broadcasting satellite and fixed satellite services and to make the former service primary in the upper half and secondary in the lower while reversing the status with the latter service. Instead, we believe a better approach is to reflect the allocation to the broadcasting satellite and fixed satellite services on a coequal primary basis with the terrestrial mobile services on a secondary basis over the entire 500 MHz between 11.7–12.2 GHz. However, a new footnote, NG 105, is being applied to the band, which will indicate our intention to make no assignments to the broadcasting or fixed satellite services in that band until the respective service and technical parameters are better defined. At such time, a Notice of Proposed Rule Making can be issued to focus attention on the respective service needs. Since system parameters and demands for either service are not yet clear, such action should not be harmful to proponents of either view. Such action is, however, a clear reflection of our ultimate general allocation intentions.

18. With respect to the 2500–2690 MHz band, the majority of the comments dealt with the restrictions imposed by proposed footnote NG 102. CPB, NAEB, JCET, ComSat and Hughes (in their reply comments) support the extension of the 2500–2535 MHz downlink and 2655–2690 MHz uplink bands in the fixed-satellite service to the contiguous United States as well as Alaska, Hawaii, Guam, Samoa and the Trust Territories. As pointed out in the Notice (paragraph 14), it was originally planned to limit such use to Alaska, but this use was extended to the Pacific areas to meet a need for an interface between the islands and the global communication networks after it was noted there were no terrestrial assignments in either Guam or Hawaii in the two bands. It was originally believed the present high usage coupled with that anticipated by educators in the 2500–2690 MHz Instructional Television Fixed Service band would preclude satisfactory sharing of the two 35 MHz links in the contiguous United States.

19. In view of the fact that terrestrial usage of the 2500–2690 MHz band appears concentrated in urban areas and that the educational community strongly supports extension of the fixed satellite allocation to the entire United States to meet their prospective needs for two-way

audio transmissions, we believe that, with careful system design, a relaxation of the proposed restriction is feasible. Consequently, we are making the 2500–2535 MHz and 2655–2690 MHz bands available to the educational community in the contiguous United States. Because we believe the thin-route fixed-satellite needs in Alaska and the Pacific region can be met by sharing those bands with educational services in those areas, we will retain footnote NG 102 as was proposed, at least until the needs of each service become more clearly defined. Due to the lower antenna elevation angles required in Alaska as opposed to those in lower latitudes, the restrictions imposed on terrestrial stations in the 2655–2690 MHz band by footnote NG 47 will still apply in order to protect satellite-borne receivers in that band.

20. Fairchild, in their comments, indicated that the limited separation between the uplink and downlink would "probably" make it difficult to provide sufficient isolation between the transmitter and receiver within the weight constraints normally associated with communication satellites. Hughes, in their reply comments, did not agree, basing their response on preliminary design work already conducted. While this question was not addressed by other respondents, we believe, based on available study results, that sufficient isolation can, in fact, be achieved.

21. HEW requested guidance with respect to a matching uplink band to feed broadcasting satellite use of the 2500–2690 MHz band. We agree with ComSat that the design of satellite systems should not be restricted at this time. Instead, it should be pointed out that the use of any fixed-satellite band would be appropriate for the purpose. Since, depending on the particular needs and system design, several bands could be required, it appears premature to make a designation at this time.

22. CPB, while pleased with the allocation of the 2500–2690 MHz band to the broadcasting satellite service, nevertheless expressed reservations about the utility of the band for that purpose in view of the need for sharing the two-35 MHz bands at each end with the fixed satellite service. Despite their reservations, they advocate use of the bands in the conterminous United States as well as Alaska and the Pacific basin proposed. They explain this inconsistency by expressing the belief that any broadcasting satellite service will likely develop at 12 GHz instead of at 2.5 GHz. Because the United States intends the band to be used for community reception of educational and public service material and for fixed satellite usage by the educational community in the United States (except as stated above), we believe the utility of the 2500–2690 MHz band has been enhanced.

23. CPB also expressed concern about possible constraints in view of a possible guardband between the radio astronomy service in the 2690–2700 MHz band and the broadcasting satellite service between 2500–2690 MHz. GE believed the problems regarding protection of radio astronomy from satellite operations in the 2500–2690 MHz band are overstated. They cited the fact that, because of the continued relative motion of the satellite, the probability of main lobe reception of out-of-band interference is low for the worst case and is zero for most.

24. We believe the incorporation of reasonable technical measures in the bands 2500–2690 and 2690–2700 MHz on behalf of each of the services involved will enhance sharing between broadcasting satellites and radio astronomy operations. The results of the forthcoming ATS–F tests should provide valuable data in this regard. Further, the provisions of existing footnote U.S. 74 are also relevant.

25. GE suggested that additional restrictions were needed on installation of transmitters in those areas of Alaska and the Pacific Basin to be served by community or thin route satellites. We agree that conditions of frequency coordination, siting, elevation angles and power flux density, etc. may need to be imposed. However, pending design of such systems, we are not prepared to delineate with greater specificity than presently imposed. We believe greater utility of the frequency band can be achieved at this time by calling attention to the interference potentials and permitting design flexibility than could be achieved by attempting to develop arbitrary standards based on hypothetical situations. In view of tests scheduled by NASA and other entities in connection with the ATS program, better information in this regard is expected to be made available in the near future.

FIXED SATELLITE SERVICE

26. The frequency bands allocated by the Space WARC to the Fixed Satellite Service were reflected in paragraph 19 of the Notice of Proposed Rule Making. In addition to the 2500–2690 MHz and 11.7–12.2 MHz bands which were proposed for sharing with the broadcasting satellite service and which were discussed above, the band 6625–7125 MHz and the bands 10.95–11.2, 11.45–11.7, 17.7–19.7 and 19.7–21.2 GHz proposed for allocation to the fixed satellite service generated the most comment. The allocation of the 59–64 GHz band to Government services drew significant discussion also.

27. Apparently because the U.S. proposal to allocate the 6625–7125 MHz band to the fixed satellite service on a coequal shared basis with terrestrial fixed and mobile services in Region 2 was a last minute change to our position and had been misunderstood or at least inadequately explained, API, NAM and the UTC directed a great deal of comment toward it. All three expressed concern for adequate spectrum in which operational fixed microwave growth could be accommodated in this region of the spectrum. As the proposal overlaps the 6525–6875 MHz band, now allocated for private microwave services, it was believed that use of the band by fixed satellites, as proposed by footnote NG 103, would compromise use of the upper 250 MHz by those services. API expressed the opinion that no public interest consideration had been shown for raising footnote 392 AA from the WARC accepted secondary status of the fixed-satellite service to a coequal shared status in the United States.

28. As pointed out in paragraph 14 of the Report and Order in Docket No. 18294, adopted December 18, 1970, the U.S. proposal regarding the 6625–7125 MHz band was made to the WARC to provide for this essentially one-way service in an economical manner based

upon representation of the CBS Television Network Affiliates Association. Additionally, the Affiliates submitted comments and an engineering statement in Docket 16495 which showed that the 6625–7125 MHz band was more effective and efficient for satellite downlink, primarily because of increased rainfall attenuation at the higher frequency bands. The Commission's decision in Docket 18294 (the domestic satellite proceeding) considered the public interest aspects of affording local television stations an opportunity to own and operate their own stations should they so desire.

29. With respect to possible interference from space stations to terrestrial stations, the power flux density limits established by footnote No. 470 NM of the Final Acts of the WARC would appear to provide more than adequate protection for terrestrial systems operating in the 6625–7125 MHz band. Further, the burden of providing the coordination contour and proof of non-interference would, as pointed out by ComSat in their reply comments, rest with a potential earth station applicant. In view of the above, we find no merit in the objections of API and UTC to the application of footnote NG 103 to the band 6625–7125 MHz as proposed.

30. UTC also took exception to the Commission's proposal to reallocate the 17.7–19.7 and 27.5–29.5 GHz bands from the fixed and mobile services generally (e.g. both private and common carrier use) to exclusively common carrier. Their objections are based upon a need to provide spectrum relief for operational fixed services as the bands below 13 GHz become saturated. UTC suggested that sharing between terrestrial operational fixed and space systems can be accommodated just as sharing between terrestrial common carrier and space systems.

31. As AT&T correctly points out in their reply comments, the private users are not being deprived of spectrum availability in that region by virtue of the proposal. Other bands, such as 21.2–22.0 GHz, 22.0–23.6 GHz, 31.0–31.2 GHz and 38.6–40.0 GHz are available although the first two bands cited are presently to be shared with Government services. UTC has not shown any particular needs for this range of the radio spectrum as yet nor can such a showing be made at this time because lower bands allocated for operational fixed use are not yet saturated. On the contrary, common carrier bands at 4, 6 and 11 GHz are rapidly becoming saturated.

32. Further, as UTC is aware, the Commission undertook in 1958 a lengthy proceeding in Docket 11866 to determine spectrum needs and allocation policies in the bands above 890 MHz. Among the resulting policies enunciated by the Commission was the need for separate bands for common carrier and private communication systems. Based principally on differing requirements, reliability and needs between the common carrier and private services, this policy has remained; indeed the policy was underscored pursuant to proceedings in Docket 14729 in 1963 and no showing has been made that a reversal of that policy is now in order.

33. Nevertheless the Commission, on November 29, 1972, adopted a Further Notice of Proposed Rule Making in Docket No. 18920, in which it was pointed out in footnote 7a, that, before finalizing re-

striction of the 18 GHz band to common carrier use, we would consider any comments filed therein as to whether private users should also have access to the band on either a shared basis or by allocating a portion for private use.

34. Accordingly, although on the basis of the record in this proceeding, adoption of our proposal to allocate the bands 17.7–19.7 and 27.5–29.5 GHz to common carrier would be justified, we will postpone final decision with respect to the 17.7–19.7 GHz band until the comments in Docket 18920 have been considered. We will, however, allocate the band 27.5–29.5 GHz to the Common Carrier Radio Services. A new footnote NG 106, is being applied to the lower band to reflect this decision.

35. In their comments and reply comments, ComSat and AT&T respectively, differ concerning the intent with respect to limiting, by footnote NG 104, the allocation of the 10.95–11.2 and 11.45–11.7 GHz bands to the international satellite service. ComSat questions whether such a general understanding existed prior to and during the WARC and cites the fact that the Final Acts do not reflect such an understanding. ComSat further believes the bands should be available for domestic satellite communication as well, and offers comments showing that the bands could be shared by terrestrial, domestic satellite and international satellite services. ComSat concedes, however, that such sharing could influence the system design of specific systems; however, they believe more efficient use of the spectrum would result.

36. AT&T, in response, cites correspondence between it and the Commission as well as proceedings in Docket 18294 which reflect the intent for the two bands in question. AT&T, in their comments, requested the insertion of the word "transoceanic" in footnote NG 104 to so limit sharing to those international applications.

37. As the Commission previously indicated in Docket 18294 (6th Notice of Proposed Rule Making, paragraph 38, and 7th Report and Order, paragraph 28), the anticipated profusion of earth stations coupled with the growth of terrestrial microwave stations in the 10.7–11.7 GHz band was expected to create severe problems if the domestic satellite service were permitted co-use of the bands. While the position may be somewhat inconsistent with that taken with respect to the 4 and 6 GHz bands, as alleged by ComSat, the Commission is not persuaded that a change in the position previously stated is warranted at this time. Accordingly, ComSat's arguments are denied.

38. With respect to the request of AT&T regarding modification of footnote NG 104 to include the word "transoceanic" in further restriction of international satellite operations, we do not concur. As pointed out by ComSat, such a restriction could be interpreted to preclude service to other countries of the western hemisphere. We believe the number of earth stations involved with such operations to be so small as to create few problems of potential interference to the terrestrial network. Therefore, footnote NG 104 will remain as proposed.

39. Several respondents, notably AT&T, NAM, GE and Fairchild, recommended action be initiated to extend non-Government sharing

of certain frequency bands into spectrum allocated to Government services. These bands included the 59–64 GHz, 7125–8400 MHz, and 14.5–15.35 GHz bands. Such action is outside the scope of the instant proceeding; however, should the necessity arise and adequate justification become available, such action may be initiated in the Commission's continuing review with the Federal Government of spectrum allocation matters.

40. Fairchild indicated the 6625–7125 MHz band fixed satellite downlink approved along with the 14.0–14.5 GHz uplink as a companion band could pose problems because of the possibility of second harmonic interference and urged the Commission to investigate the possibility of a more compatible uplink.

41. As pointed out in paragraph 17 of the Notice, the uplink band originally proposed by the United States, 12.75–13.25 GHz, was not accepted by the WARC. As a compromise, the band 14.0–14.5 GHz was allocated. Since neither the WARC Final Acts nor the Commission's Rules match a given uplink band with a specific downlink band, this newly-allocated band might be employed by domestic systems using the 11.7–12.2 GHz downlink band (subject to footnote NG 105), and by international systems using the 10.95–11.2 and 11.45–11.7 GHz downlink bands.

MISCELLANEOUS ISSUES

42. ARINC/ATA, in their comments, generally supported the Commission's proposal relating to the aviation needs, but raised two points. The first deals with the need to accommodate the conventional aeronautical mobile environment as well as the application of space techniques. Accordingly, they believed that terrestrial use of the 1535–1660 MHz band for the aeronautical mobile (R) services should be on an equal basis with the aeronautical mobile satellite (R) services. The second issue deals with a Petition for Rule Making (RM 1861) which was filed with the Commission on September 30, 1971 and which requests allocations for two sub-bands of 4 MHz each to accommodate projected 1985 control requirements. That petition is still pending before the Commission.

43. Both of these issues were raised during the development of the United States position for the Space WARC in Docket 18294. We are aware the matters have not yet been formally considered and that dispositive actions have not yet been taken. While the Commission understands the concern of ARINC in these matters, we are also aware of discussions now taking place within the aviation community, both domestically and internationally, regarding aeronautical needs in the band. Additionally, the Maritime WARC scheduled for 1974 is also expected to consider use of the 1535–1660 MHz band, portions of which are shared between the Maritime Mobile Satellite and Aeronautical Mobile Satellite Services. We therefore believe consideration of the ARINC/ATA proposals in this proceeding is premature and inappropriate. Accordingly they are denied

44. General Electric also submitted comments concerning the suitability of bands allocated for the maritime and aeronautical satellite

needs. Their comments were based upon an internal study which indicates that the allocations are somewhat less than optimum. GE raised the matter not as a recommendation, but for information primarily because the study is incomplete. Accordingly, we will note the comments and suggest that further information derived be made available when the time is more appropriate and conclusions are more reliable.

45. GE also endorsed the Commission's proposals with respect to the Radio Navigation, Standard Frequency and Time Signal Satellite Services, and suggested changing the wording of certain footnotes (U.S. 201, for example) to read "outside of U.S.A. territorial limits" where flux density limitations are imposed. Such action, GE believes, would be more consistent with the wording of (332A) where a distinction between domestic and international interference protection might be desired. In addition to the practical problem of adhering to specified limits at prescribed boundaries, it should be noted the power flux density limits were established to meet acceptable operational parameters of the earth exploration satellite service to permit sharing with existing services. Further, such an approach is preferable, since by implication, the proposed condition would permit greater power flux density limits domestically—a condition not intended. Accordingly, the suggestion is denied.

46. In view of the foregoing, the Commission believes the changes discussed are in the public interest, convenience and necessity. Accordingly, IT IS ORDERED, in accordance with authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, the Table of Frequency Allocations contained in Part 2 of the Commission's Rules and Regulations is amended as reflected in the attached Appendix [1] effective March 1, 1973. Although the Commission is making this Order effective with the publishing of the Federal Register in which this decision appears, it should be noted the Final Acts of the Space WARC enterd into force internationally on January 1, 1973.

47. IT IS FURTHER ORDERED that the proceedings in Docket 19547, ARE HEREBY TERMINATED.

BEN F. WAPLE, *Secretary.*

[1] Amendment to rules are not included in this publication. For text of changes see the Federal Register of March 1, 1973, 38 F.R. 5562.

109-030—73——8

F.C.C. 73R–95

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ST. CROSS BROADCASTING, INC., SANTA CRUZ, CALIF. JAMES B. FENTON, GRANT R. WRATHALL, JR., LAWRENCE M. WRATHALL AND LORETTA WRATHALL, D.B.A. PROGRESSIVE BROADCASTING CO., APTOS-CAPITOLA, CALIF. For Construction Permits	DOCKET NO. 19503 File No. BP–18014 DOCKET NO. 19506 File No. BP–18221

MEMORANDUM OPINION AND ORDER

(Adopted March 1, 1973; Released March 5, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER DISSENTING WITH STATEMENT. BOARD MEMBER NELSON EXPRESSING ADDITIONAL VIEWS WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of St. Cross Broadcasting, Inc. (St. Cross) and Progressive Broadcasting Company (Progressive) for a new standard broadcast station at Santa Cruz, California and Aptos-Capitola, California, respectively.[1] The Commission designated the applications for hearing by Order, FCC 72–422 (37 FR 10611, published May 25, 1972), specifying, *inter alia*, Suburban Community and engineering issues against Progressive,[2] and areas and populations and 307(b) issues. Now before the Review Board for consideration is a motion to enlarge issues, filed June 9, 1972, by St. Cross, seeking the addition of a further Suburban Community issue and *Suburban* and cross ownership/cross interest issues against Progressive.[3]

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[1] The applications of Milo Communications Corporation (Milo), Do. 19504, and Lloyd M. Marks (Marks), Do. 19505, also designated for hearing, were dismissed by the Administrative Law Judge pursuant to their petitions to dismiss. Marks' application was dismissed by Order FCC 72M–853, released June 30, 1972; Milo's application was dismissed by Order FCC 72M–1325, released October 25, 1972.

[2] The Commission specified a Suburban Community issue against Progressive because its proposed 5 mv/m contour would penetrate Salinas, California, a city with a population of over 50,000, which is more than twice the size of Aptos-Capitola. The Commission found that the applicant did not effectively rebut the presumption that it realistically proposes to serve the larger city. See Policy Statement on *Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965).

[3] Also before the Board are: (a) opposition, filed June 30, 1972, by Milo; (b) opposition, filed July 3, 1972, by Progressive; (c) Broadcast Bureau's comments, filed July 3, 1972; (d) reply to (a), filed July 14, 1972, by St. Cross; (e) reply to (c) filed July 14, 1972, by St. Cross; (f) reply to (b), filed July 17, 1972, by St. Cross; (g) further opposition, filed August 7, 1972, by Progressive; (h) a letter received August 22, 1972, from St. Cross; (i) a letter received August 25, 1972, from Progressive. Insofar as the motion seeks to add issues against Milo and Marks, it is now moot and will be dismissed. See note 1, *supra*. Progressive's "further opposition" to St. Cross' motion, filed August 7, 1972 is an unauthorized pleading and good cause for its acceptance has not been shown. Therefore, it will be dismissed. See the Board's Public Notice on the *Filing of Supplemental Pleadings before the Review Board* No. 90836, released October 11, 1972. See also *Southern Broadcasting Company (WGHP–TV)*, FCC 73R–17, — FCC 2d —, released January 12, 1973.

SUBURBAN COMMUNITY ISSUE

2. In support of its request for another Suburban Community issue against Progressive, St. Cross argues that Aptos (population 8,704) [4] and Capitola (population 5,080), are small communities which are completely dominated in their political, economic, and social life by the neighboring city of Santa Cruz (population 32,076). St. Cross also asserts that Progressive could adequately cover Aptos-Capitola with a power of 250 watts and that the 5 kw power proposed indicates that Progressive realistically intends to serve Santa Cruz. Finally, St. Cross urges that the ascertainment efforts conducted by Progressive support its allegations, in that contacts with community leaders were oriented to Santa Cruz City and the county as a whole rather than to Aptos-Capitola. According to St. Cross, the needs revealed by Progressive's survey are not peculiar to Aptos-Capitola, and, furthermore, those needs are presently being met and can be met by stations located in Santa Cruz City.

3. In its opposition, Progressive first argues that St. Cross has failed to make the threshold showing necessary for addition of the requested issue, claiming that no concrete facts have been presented to support the allegations concerning either Aptos-Capitola's dependence on Santa Cruz or Progressive's engineering proposal. Progressive further asserts that the allegations made by St. Cross are not in accord with the facts and that only a limited suburban-city relationship exists between Santa Cruz and Aptos-Capitola. Attached to Progressive's pleading are data in support of its allegations that Aptos and Capitola are economically and politically independent and that social, recreational and cultural facilities exist outside of Santa Cruz City. Its ascertainment efforts, Progressive claims, were directed to the Aptos-Capitola area and resulted in the identification of the area's distinct needs and interests. Finally, Progressive submits an exhibit which, it claims, shows that the power it proposes complies with Commission regulations for service to its specified community.

4. The Broadcast Bureau supports addition of the issue, noting that Progressive proposes to place a 5 mv/m signal over most, if not all, of Santa Cruz, a city with a substantially larger population than Aptos-Capitola. The Bureau submits that a less powerful proposal could serve Aptos-Capitola, rather than one which is directionalized to place a major lobe over Santa Cruz. The Bureau also agrees with St. Cross that the community needs listed by Progressive in its application are as applicable to Santa Cruz County as a whole, including Santa Cruz City, as they are to Aptos and Capitola.

5. In its reply to Progressive's opposition, St. Cross contests the facts alleged in Progressive's pleadings and the implications to be drawn therefrom, concluding that Progressive has not rebutted movant's showing that Santa Cruz City dominates the surrounding area and that the needs of Aptos-Capitola are essentially the same as those of the rest of the county, including Santa Cruz City. An

[4] All population figures herein are derived from the 1970 U.S. Census.

evidentiary hearing, urges St. Cross, is therefore necessary to resolve the question.

6. The Review Board is of the view that the pleadings raise a substantial question as to whether Progressive's proposed facility will realistically provide service for the two communities it has specified in its application or for the nearby larger community of Santa Cruz. This question is raised in large part by Progressive's engineering proposal. The Board agrees with the Broadcast Bureau that 5 kw of power does, on its face, seem to be greatly in excess of that needed to provide adequate coverage of the specified communities. The gravity of this question is compounded by the fact that Progressive plans a directionalized signal, with one major lobe of its pattern substantially, if not completely, covering Santa Cruz City with a 5 mv/m signal. Furthermore, Progressive has failed to make an adequate showing that the proposed power and directional system indicate a clear intention to direct its service to its specified community. The applicant has merely stated that its proposed power would be "adequate" and that a station with less power "would not be competitive signal wise" in neighboring communities with the signals of other area stations.[5] In our opinion, this is not an adequate explanation and raises serious questions concerning Progressive's intentions. Compare *Creek County Broadcasting Co.*, 31 FCC 2d 462, 22 RR 2d 891 (1971). *Cf. Babcom, Inc.*, 12 FCC 2d 306, 12 RR 2d 998 (1968).

7. Furthermore, St. Cross' motion raises a substantial question as to whether the needs and interests of Aptos-Capitola are truly distinct from those of Santa Cruz City, a neighboring city with over two times the combined populations of the specified communities. Progressive has, in fact, shown that in some respects the smaller communities are definables areas apart from Santa Cruz City with some problems which are distinct from those of a larger urban community. However, the pleadings and Progressive's community survey showing indicate that the economic, cultural and recreational activities of those areas may be so integrated with or dependent upon Santa Cruz City that Aptos and Capitola should not be considered distinct and independent communities for 307(b) purposes. Progressive's "community profile", submitted as an amendment to its application, deals in general with Santa Cruz County as a whole and includes specific references to Aptos, Capitola and Santa Cruz City with no distinctions drawn to indicate that all three communities are other than similar elements of that integrated whole. Furthermore, a large number of the civic, political, and cultural organizations listed by Progressive in its pleadings as serving Aptos and Capitola appear to encompass the entire county [6] or the Santa Cruz-mid-county area,[7] while not more than 25% of all the organizations listed in Progressive's community survey, including those contained in its pleadings, appear to direct their activities exclusively to Aptos, Capitola, or at least the mid-county area as

[5] KSCO in Santa Cruz; KDON and KSBW in Salinas.
[6] For example, the Santa Cruz County Fair, Women's League of Voters of Santa Cruz County, Santa Cruz County Central Labor Council, Santa Cruz County Arts Commission.
[7] For example, the Local Red Cross (City of Santa Cruz and Mid-County), United Fund—City of Santa Cruz and Mid-County.

distinguished from Santa Cruz City. The majority of the ascertained needs listed by Progressive in its exhibit, including those given the greatest priority by Progressive, also are stated in terms of problems which encompass both Santa Cruz City and its neighbors.[8] Finally, while Progressive has cited in its opposition several needs ascertained from its random survey that relate specifically to Aptos-Capitola, there are at least that many references to Santa Cruz City or county-wide problems listed in that survey. In sum, we have found that Progressive's ascertainment efforts, on their face, indicate that the communities specified by Progressive in its application may be so dominated by or integrated with their larger neighbor that they are not to be considered distinct and independent communities within the meaning of section 307(b). This question can best be resolved within the framework of a full evidentiary hearing. Therefore, we will broaden the scope of the existing Suburban Community issue (see paragraph 1, *supra*) to encompass a determination with regard to the city of Santa Cruz.

SUBURBAN ISSUE

8. Next, St. Cross argues that certain aspects of Progressive's ascertainment efforts raise questions which warrant addition of a *Suburban* issue. Movant alleges that the efforts show that Progressive has not adequately ascertained the needs of the specified communities, but only those of the entire Santa Cruz County area. The Board does not believe that such an issue is warranted. While Progressive's ascertainment efforts do raise a question whether the needs of Aptos-Capitola and Santa Cruz are distinct, St. Cross has not shown that the needs listed by Progressive are not those of Aptos-Capitola, that the process of ascertaining those needs was inadequate or improper, or that the programming proposed by Progressive was not responsive to the needs ascertained.

CROSS OWNERSHIP/CROSS INTEREST ISSUES

9. St. Cross alleges that standard broadcast station KSAY, San Francisco, California, is owned in part by three of the Progressive partners and, furthermore, that the controlling partner and chief engineer of KSAY is both the father of those partners and the consulting engineer for the Progressive application. St. Cross claims that since there will be an overlap of the 1.0 mv/m contour of KSAY and the 1.0 mv/m contour of Progressive's proposed station, cross ownership and cross interest issues are warranted.[9] Progressive and the Broadcast Bureau oppose the request. Progressive claims that the three Progressive partners, together own only a 16% interest in KSAY

[8] It is apparent from Progressive's list of needs that "county problems" are those of both Santa Cruz and the Aptos-Capitola area. We also note that several of the problems referred to as "county" problems in Progressive's exhibit are referred to as problems of "Aptos-Capitola" in the pleadings before us. An evidentiary hearing will also allow this ambiguity to be resolved.

[9] The Commission's cross ownership rule (Section 73.35(a)) forbids ownership or control of two stations whose 1.0 mv/m contours overlap. The derivative cross interest policy forbids meaningful interests in two stations whose 1.0 mv/m contours overlap and which serve substantially the same area. See *United Community Enterprises, Inc.*, 37 FCC 2d 953, 25 RR 2d 745 (1972).

as limited partners and that a trustee owns another 16% for their benefit. Progressive asserts that neither the limited partnership interests nor the trust arrangement give Progressive's partners "any voice whatsoever" in the policies or management of KSAY. The Broadcast Bureau argues that St. Cross did not utilize acceptable engineering methodology and, therefore, that no adequate showing of overlap has been made. In reply, St. Cross asserts that it has established overlap and that the positions held by Grant R. Wrathall (father of the three Progressive partners) and his relationship with the Progressive partners require addition of the requested issues.

10. In our opinion, St. Cross has not raised a sufficient question of overlap to warrant addition of the requested issues. St. Cross utilizes measurement data contained in the Progressive application to reach its determination of the proposed Progressive 1.0 mv/m contour. The data were taken on a test transmitter located near the proposed Progressive site from which the soil conductivities were determined for paths along 82 and 108 degrees. Contending that measured ground conductivity is "normally" valid over a plus or minus 10 degrees from the measured radial, St. Cross submits that the FCC Figure M–3 conductivity (which is higher) must therefore be used between 92 and 98 degrees and has so calculated the extent of the contour at 95 degrees. The resulting 1.0 mv/m contour (based on calculations made along 82, 95 and 108 degrees) shows overlap with what St. Cross alleges to be KSAY's 1.0 mv/m contour.[10] We are constrained to note that St. Cross' depiction of the Progressive contour along 92 degrees [11] extends more than 10 miles farther (thus showing overlap) than it would based on the 82 degree measured conductivity which St. Cross has accepted as accurate.

11. Accepting, *arguendo*, St. Cross' depiction of Progressive's proposed 1.0 mv/m contour and ignoring the resultant discrepancy, we also find that St. Cross has not depicted the KSAY contour in accordance with the methods prescribed by the Commission's rules and policies. The engineering report submitted by St. Cross in support of its motion includes measurement data taken on a "stub" radial along a path 142 degrees from KSAY.[12] These "stub" radial measurements are not acceptable. St. Cross has failed to comply with Rule 73.186, which requires that the inverse distance field be determined by taking measurements within a few miles of the transmitter.[13] *Lake Valley Broad-*

[10] St. Cross has submitted a map along with the motion which depicts the alleged overlap.
[11] The 92 degree azimuth crosses within the area of alleged overlap.
[12] The St. Cross data include the following seven measured points:

Point No.	Distance (miles)	Measured signal (mv/m)
1	58.5	1.52
2	64.5	1.03
3	68.0	1.01
4	71.5	0.98
5	76.0	0.98
6	80.0	0.94
7	83.5	0.93

[13] The determination of the inverse distance field provides a necessary check as to whether the transmitter being measured is operating at its authorized power.

casters, Inc., 38 FCC 622, 4 RR 2d 913 (1965). Instead, St. Cross has stated that it "assumed" an inverse distance field for the measured radial. Finally, if the proposed Progressive 1.0 mv/m contour is as depicted by St. Cross and if the "stub" data with regard to KSAY are accurate, we still do not find overlap. We find, instead, that St. Cross has incorrectly depicted the extent of the KSAY 1.0 mv/m contour. As shown in note 12, *supra*, the KSAY signal beyond 71.5 miles was determined to be *less* than 1.0 mv/m. St. Cross has depicted the KSAY 1.0 mv/m contour as extending greater than that distance from KSAY. However, using acceptable methodology [14] at 71.5 miles there would be no overlap with the Progressive 1.0 mv/m contour, even as the Progressive contour is depicted by St. Cross. In view of the above, the Board will not add the requested issues.

12. Accordingly, IT IS ORDERED, That the further opposition to motion to enlarge issues, filed August 7, 1972, by Progressive Broadcasting Company, IS DISMISSED; and

13. IT IS FURTHER ORDERED, That the motion to enlarge issues, filed June 9, 1972, by St. Cross Broadcasting, Inc., IS GRANTED to the extent indicated below, IS DISMISSED as against Milo Communications Corporation (KMPG) and Lloyd M. Marks, and IS DENIED in all other respects; and

14. IT IS FURTHER ORDERED, That the Suburban Community issue against Progressive Broadcasting Company, specified by the Commission in the designation Order (FCC 72–422) IS BROADENED to include a determination with respect to the city of Santa Cruz, California.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

On the basis of my separate concurring opinion in connection with the Board's decision in the *Greensburg* case (Docket No. 18868) (FCC 73R–53), released February 2, 1973, I would certify the instant matter to the Commission. As there stated in greater detail, (a) the Court's [15] call for clarification of the Suburban Community issues, *viz.*, the type and degree of evidence; and (b) the irreconciliable conflicts of view not only among applicants but also among the Commission's own staff, *i.e.*, its Broadcasting Bureau, administrative law judges, and members of this Board, create a unique state of affairs and novel policy questions which require Commission attention. Without question, clarification is required not only as to the type and degree of evidence required with respect to the Suburban Community issues, it is also required in the context of the interrelationship of the more recently adopted *Primer on Community Ascertainment* [16] to the Suburban Community

[14] The methodology for using this data, were it acceptable, is established in *Denver Area Broadcasters*, 38 FCC 583, 4 RR 2d 895 (1965) (para. 16).
[15] *Northern Indiana Broadcasters, Inc.* v. *FCC*, 148 U.S. App. D.C. 327, 459 F.2d 1351, 23 RR 2d 2113 (1972).
[16] 27 FCC 2d 650 (1971).

issues, if not in the context of the interrelationship of the *Primer* to the Suburban Community policy, *per se*.

Hence, pending Commission clarification, continued specification of Suburban Community issues by the Board is wasteful of the adjudicatory hearing processes, quite apart from the fact that litigation with respect to such issues is both costly and time consuming to all concerned, namely, the applicants, the Broadcast Bureau, administrative law judges, and this Board. Under these circumstances, certification to the Commission of all requests for Suburban Community issues is more conducive to the orderly and efficient administration of its business. In reaching my conclusions here, I am, of course, mindful of the fact that the Board here is merely enlarging or broadening the scope of an existing Suburban Community issue to encompass another larger city in the same general area, namely, Santa Cruz, whereas the original issues related to Salinas only. However, in principle I cannot distinguish what has occurred here from the situation where the Board adds a new issue. Both result in protracted hearings requiring substantial evidence under circumstances where the parties cannot be deemed to be on "notice" as to the type and degree of the evidence required to rebut the Suburban Community presumption.

ADDITIONAL VIEWS OF BOARD MEMBER JOSEPH N. NELSON

I agree with Dissenting Statement that the Court's decision in *Northern Indiana* requires clarification and revision by the Commission of its criteria in *Suburban Community Policy* cases. It is my view that no application can be denied on the basis of the Commission's existing criteria. However, since the issue in the instant case was framed by the Commission, I would apply the Court's holding at the time of decision should the subject application be denied.

F.C.C. 73-212

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION) Transmittal No. 6834; and Revisions of Telex Tariff F.C.C. No. 240 and Teleprinter Exchange (TWX) Tariff F.C.C. No. 258	Docket No. 19696

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released March 6, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ISSUING A SEPARATE STATEMENT IN WHICH COMMISSIONERS ROBERT E. LEE, H. REX LEE, REID, WILEY AND HOOKS JOIN; COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. On December 29, 1972, revised tariff schedules were filed by Western Union under Transmittal No. 6834 to become effective February 28, 1973.[1] These revised schedules apply to the interstate Telex and TWX services provided by Western Union throughout the United States. In the case of both Telex and TWX the basic rate elements will include an access charge, an installation charge for such access, and message or usage charges that vary with time and distance of transmission of messages. Additionally, charges will be applicable where a customer desires Western Union terminal equipment.

2. The specific changes made in the revised tariff are described briefly as follows:

a. Customers will be permitted to provide their own teleprinter terminal equipment from sources other than Western Union subject to certain technical limitations to prevent electrical interference in the Telex and TWX services;

b. Two new rate elements are added to the tariff; an "access charge" which will be applicable to all customers, and a "terminal charge" which will be applicable only to customers who choose to lease terminal equipment from Western Union.

c. The installation, move, and monthly rental charges for both Telex and TWX terminal equipment are increased;

d. The Telex usage charge is increased by eliminating a quantity discount now allowed under the present tariff; and

e. A new regulation is added to the effect that customers may terminate Telex and TWX services on 30 days written notice to Western Union.

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[1] A Petition For Suspension and Investigation was filed by the Secretary of Defense on February 14, 1973 as was a Petition for Rejection and Suspension by Western Union International, Inc. A Reply was filed by Western Union on February 20, 1973. These petitions have been considered in our disposition of this matter.

3. Western Union estimates that (a) the overall effect of the entire package tariff revisions will be to produce additional revenues of about $12 million in 1973, $14.5 million in 1974 and $16.3 million in 1975; (b) the increased revenues will increase the overall level of earnings of Western Union from a current level of 5.4% to 6.7% in 1973; (c) the Telex rate proposals would increase the Telex pre-tax earnings from 14.8% to 18.0% in 1973; and (d) the TWX rate proposals would increase the TWX pre-tax earnings from 8.6% to 12.3% in 1973.

4. To support its tariff revisions herein, Western Union has submitted the cost data and other information required by Sec. 61.38 of our rules. There are two principal reasons advanced by the carrier for the revisions. With respect to the liberalization of the interconnection provisions in the Telex and TWX tariffs, the carrier states that this is being done to implement its commitment to do so at the time of the Commission's approval of Western Union's acquisition of TWX from the Bell System (24 FCC 2d 664 676). As to the rate increases and related changes the carrier contends that its current overall earnings are inadequate; and that, unless rate relief is granted in these two services where shrinkage and shifts from rate increases would be at a minimum, Western Union is faced with a decline in its over-all return. The decline is caused by revisions in settlement agreements with the international Telex carriers which will reduce Western Union's Telex revenues by about $2.2 million in 1973, and the need to finance already committed new plant and equipment totalling about $3.9 million in 1973 and $12.4 million in 1974 in the Telex and TWX services.

5. The increase in the Telex rates amounts to an increase of about 10%. This is the fourth increase in the rates for that service over the past six years (4% in 1967; 10.6% in 1969; 8.8% in 1971). Western Union estimates a pre-tax earnings for Telex of 19.2% in 1972 and 18.0% in 1973 with the proposed increase. The TWX rate increase is the first by Western Union following the acquisition of that service from the Bell System. The estimated pre-tax returns from TWX is 7.8% for 1972 and 12.3% for 1973 with the proposed increases. On the basis of Western Union's current earnings level of 5.4% applicable to its total operations, it would appear that there may well be justification for appropriate revenue relief. However, we are of the opinion that the magnitude and nature of these increases present questions of lawfulness that should be resolved by investigation and hearing.

6. The liberalization of the tariffs for interconnection of customer-provided terminal equipment appears in general to be in keeping with the principles of our decision in *Carterfone* and we regard it as a forward step toward more effective use by the public of Western Union's services. There are, however, certain questions raised with respect thereto. For example, the new "access charge" will apply to all customers whether they use carrier or non-carrier terminal equipment, even though the "access charge" covers, in part, costs that are generated only by customers using non-carrier terminals; the Telex subscribers in some cases may provide their own network signalling unit whereas no TWX subscriber may do so; Western Union appears to disclaim all liability for transmission of signals sent or received by non-carrier ter-

minal equipment; and Western Union proposes to maintain customer-provided terminal equipment on an undefined lease or maintenance basis at charges not shown in the tariffs. Accordingly, we are of the opinion that these questions should be resolved on the basis of a hearing record.

7. In view of the foregoing, we are unable to conclude at this time that all features of the tariff revisions are just and reasonable and free of undue discrimination within the meaning of Section 201(b) and 202(a) of the Act or that the proposal of the carrier to impose charges not in the tariffs is in conformity with Sec. 203 of the Act. We shall therefore designate the revised tariff schedules for investigation and shall suspend the effectiveness thereof and enter an accounting order providing for possible refund. However, in view of the carrier's current earnings situation; the desirability of allowing customers the benefit of the proposed liberalized interconnection policy at an early date, and the protection afforded customers by the accounting and refund order we are providing herein, we will suspend the said tariff schedules for a period of one day.

8. In the present case, we believe it desirable that the Administrative Law Judge render an Initial Decision and that the trial staff of the Common Carrier Bureau be separated from both the Commission and the Administrative Law Judge. As we have previously explained, 32 FCC 2d at pg. 90, the separation of the trial staff simply means that such staff: (1) will not make any oral presentations to the Administrative Law Judge or the Commission without the other parties being present, and (2) will not make any written presentations to the Administrative Law Judge or the Commission which are not served on the other parties.

9. Accordingly, IT IS ORDERED, That, pursuant to the provisions of Sections 201, 202, 203, 204, 205 and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of the tariff schedules filed by The Western Union Telegraph Company submitted with Transmittal No. 6834 including any cancellations, amendments or reissues thereof; and no changes shall be made in such tariff schedules during the pendency of this proceeding without prior approval by the Commission;

10. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204, the tariff schedules filed by The Western Union Telegraph Company submitted with Transmittal No. 6834 ARE HEREBY SUSPENDED until March 1, 1973, and that Western Union, as to the operation of such tariff schedules, shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision therein, the Commission may by further order require the refund thereof, with interest, pursuant to Section 204 of the Act, and the carrier shall file such reports on the amounts accounted for as aforesaid as the Chief, Common Carrier Bureau shall require;

11. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the following:

(1) Whether the charges, classifications, practices, and regulations published in the aforesaid tariffs are or will be unjust and unreasonable within the meaning of Section 201(b) of the Act;

(2) Whether such charges, classifications, practices, and regulations will, or could be applied to, subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or prejudice to any person, class of persons, or locality, within the meaning of Section 202(a) of the Act;

(3) Whether the aforesaid tariffs conform to the requirements of Section 203 of the Act and Part 61 (47 CFR Part 61) of our Rules implementing that Section;

(4) If any of such charges, classifications, practices, or regulations are found to be unlawful, whether the Commission, pursuant to Section 205 of the Act, should prescribe charges, classifications, practices, and regulations for the service governed by the tariffs, and if so, what should be prescribed.

12. IT IS FURTHER ORDERED, That, the hearing in this proceeding shall commence at the Commission offices in Washington, D.C. at a time to be specified by the presiding Administrative Law Judge; and that such Administrative Law Judge shall, upon the closing of the record, prepare an initial decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 C.F.R. 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. 1.282 and that the trial staff of the Common Carrier Bureau be separated both from the Commission and from the Administrative Law Judge;

13. IT IS FURTHER ORDERED, That, the Petitions For Suspension and Investigation and For Rejection or Suspension ARE GRANTED to the extent noted herein and otherwise DENIED.

14. IT IS FURTHER ORDERED, That, The Western Union Telegraph Company is named Party Respondent.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

SEPARATE STATEMENT OF CHAIRMAN DEAN BURCH IN WHICH COMMISSIONERS ROBERT E. LEE, H. REX LEE, REID, WILEY AND HOOKS JOIN

The staff understandably resists the separation procedures imposed herein essentially on grounds of economics and ease of administration. These arguments are valid to a certain extent and the Commission, fully cognizant of its budgetary constraints, will attempt to deal with the budgetary problems, forthwith.

On the other hand, when due process and ease of administration are in conflict, the latter will simply have to take a back seat.

OPINION OF COMMISSIONER NICHOLAS JOHNSON, CONCURRING IN PART AND DISSENTING IN PART

Today the Commission sets for hearing significant increases in the prices of Western Union's TWX and Telex teleprinter exchange services. I concur in the majority's action insofar as it sets up a separate Trial Staff to participate in this case and advocate the public interest.

The Commission in recent actions has come to the view that there should be a separated Trial Staff in common carrier proceedings. It is a view I have held for some time. Most of the discussion that has led to this change has evinced concern that it is not fair to a common carrier like Bell or Western Union for the Commission's Common Carrier Bureau staff to participate in a hearing, supposedly not as advocates, and then try to objectively advise the Commissioners *in camera* on the final decision in the case. I do not believe common carriers lack for opportunity to present their views to the Commissioners, nor do I believe our staff is unfair in the way it advises the Commission, nonetheless I support this increased measure of insuring fairness. As a matter of law it seems well settled that the Commission is not required to separate its Common Carrier Bureau staff in these ratemaking/rulemaking proceedings. And I agree with the Chairman's statement in this case which points out the serious budget implications of using separated staffs. We simply must have more resources for common carrier regulation. We are not doing our job now.

But my support for separation of a Trial Staff rests on a premise in addition to that of fairness. I believe it is important for the Commission to have a Trial Staff which feels no inhibition in advocating the consumer or public interest in these cases. I believe we get better advocacy when our staff is separated, we make better decisions, and the public is better protected. But apparently some carriers are having second thoughts about the benefits of Trial Staff separation. Bell apparently likes the fairness aspects, but doesn't like the vigor of Trial Staff public interest advocacy, and would like the Commission to rein in its Trial Staff. I hope the majority has no intention of giving the carriers all the benefits of this new fairness, while at the same time taking away from the public the benefits of improved consumer advocacy. It is a situation that will bear watching, and I hope our staff reports any efforts to crimp the performance of their important duties in these proceedings.

I cannot join the majority in the rest of its order on these Western Union price increases. This is the fourth increase in Telex rates in six years. The rate of increase is about 10% this time.

Competition between TWX and Telex was eliminated when the Commission permitted Western Union to buy TWX from Bell. Western Union estimates a pre-tax earnings of 19.2% on Telex in 1972 and 18% in 1973 with these increases. The earnings for TWX will be 7.8% in 1972 and 12.3% in 1973. Yet the majority does not use its full suspension power, which it believes to be a 90-day suspension, and instead suspends for only one day. In addition there are serious questions

of the pricing and cost allocation procedures to be used in evaluating whether these prices are lawful. These issues depend to some extent on decisions the Commission must make in other proceedings. As I have said before, I would suspend for as long as it takes to litigate the public interest issues any significant tariff changes by common carriers, particularly where those issues depend upon decisions in proceeedings that have been going for so many years here. I believe the Commission has the power to enter such a suspension order. Until the Commission makes decisions in these long-delayed proceedings, and has some guidelines by which to test major tariff changes, I believe we have no other course.

There is another reason why the majority should have entered a longer suspension order in these price increases. If anyone is interested in what the differences are between Phase II and Phase III of President Nixon's inflation control policies, here is a good example. Under the rules of Phase II, this Commission would have been compelled to suspend the price increases for at least 90 days, and perhaps for the full period of time needed to litigate the issues in this investigation. Under Phase III the 10% price increases go into effect with a one day suspension, and I detect no great interest in whatever review structure is left in Phase III to review what the Commission has done here.

Things are back to normal.